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No. 716

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ELLINGSON TIMBER COMPANY, *Petitioner-Plaintiff,*

v.

GREAT NORTHERN RAILWAY COMPANY, a Corporation; and WESTERN PACIFIC RAILROAD COMPANY, a Corporation, *Respondents-Defendants.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion and order of June 20, 1968, of the District Court for the District of Oregon has not been officially reported; it is reprinted as Appendix G to this petition. (App. 77a.) The decision of April 21, 1970, of the United States Court of Appeals for the Ninth Circuit is not yet reported; it is reprinted as Appendix H to this petition. (App. 81a.)

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 21, 1970. (App. 81a.) The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). On July 7, 1970, Mr. Justice White extended the time for filing this petition to and including August 19, 1970. On August 5, 1970, Mr. Justice Marshall further extended the time for filing this petition to and including September 18, 1970.

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by preliminarily segregating certain issues for separate trial, which led to summary disposition of a complex antitrust suit on those issues, where plaintiff had been denied from the very outset the benefit of discovery on numerous factual matters inextricably related to both the overall merits of the case and to the segregated issues?

2. Whether a federal district court lacks jurisdiction in an antitrust case charging a conspiracy which achieved its unlawful objectives *partly* through the use of a common carrier rate that had previously been found lawful under the Interstate Commerce Act?

3. Whether the Clayton Act's statute of limitations bars an antitrust suit where maintenance of a joint common carrier rate, an element in the alleged illegal conspiracy, coupled with petitioner's presence in the market as a competitor, constitutes the only known "overt" act continuing into the limitations period?

4. Whether the alleged possession of monopoly power in violation of Section 2 of the Sherman Act within the

four years' preceding suit, coupled with plaintiff's presence as an affected competitor in the market, constitutes sufficient overtness to sustain a cause of action against an asserted Clayton Act statute of limitations defense?

5. Whether the district court deprived petitioner of its constitutional right to a jury trial by segregating jurisdictional and limitations issues for separate trial before the court, where said issues involved disputed questions of fact peculiarly within the province of the jury and where petitioner made a timely demand for a jury trial; and, whether petitioner's failure to reassert its demand therefor, standing alone, constituted a waiver of said right?

STATUTORY PROVISIONS

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1964), in pertinent part, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2 (1964), provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, 14 U.S.C. § 15 (1964), provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 4b of the Clayton Act, 15 U.S.C. § 15b (1964), in pertinent part, provides:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."

STATEMENT

The petitioner-plaintiff, Ellingson Timber Company ("Ellingson", "petitioner" or "plaintiff"), is a relatively small company engaged in the acquisition of timber, the manufacture of lumber products, and the sale and distribution of such products in various parts of the country.

The respondent-defendant, Great Northern Railway Company ("GN"), is one of the larger rail carriers in the country, operating an extensive railroad system principally through the north central and the pacific northwest regions of the country.

The other respondent-defendant, Western Pacific Railroad Company ("WP"), operates an extensive railroad system, primarily from Oakland, California, to Salt Lake City, Utah, with numerous connecting

lines and feeders. Additionally, it constitutes an important link in the through route to Chicago, Illinois, and in the center portion of the north-south pacific coast route.

Ellingson's lumber operations pertinent to this petition involved its Big Lakes mill at Klamath Falls, Oregon, located just east of the Cascade Range in southern Oregon near the California state line. Competing mills in Klamath Falls during the relevant period included the Klamath Basin Pine Mills ("KBPM"), which was acquired by GN in 1931 but was leased to and operated by independent companies until 1961, when it was sold to a third party.

Standing timber owned by the United States in the Jellico-Poison Lake area, part of the Lassen Forest in northern California approximately 135 miles southeast of Klamath Falls, is periodically offered for sale at public auction. Ellingson was the successful bidder against KBPM at Jellico in July, 1955, and at Poison Lake in January, 1957. Log shipments therefrom to Klamath Falls commenced on July 9, 1956, and ceased on August 8, 1958. They were made in the only way feasible: by rail—and for such shipments Ellingson was totally dependent on WP for about one-quarter of the distance and on GN for the remaining distance to Klamath Falls.

Ellingson's local competitor, KBPM, shipped logs from Ash Creek, California, to Klamath Falls. Ash Creek is south of Klamath Falls in northern California. It is somewhat closer to Klamath Falls in actual distance than is the Jellico-Poison Lake area. However, the rail shipping route between Ash Creek and Klamath Falls via GN and a third line is somewhat longer.

In 1956, GN and WP established a joint rate from the Jellico and Poison Lake points to Klamath Falls. This rate was higher than the rate for the longer Ash Creek to Klamath Falls run utilized by Ellingson's competitor, KBPM. Also, Ellingson was subject to a "cutback" provision (the only one in which WP or GN had participated) which added approximately 40% to the rate. The so-called "cutback" arrangement provided for a high flat rate for log shipments to the mill. However, if, within 24 months after such shipments, Ellingson shipped its lumber products *eastward* on a GN or WP transcontinental route, it could obtain a 40% noninterest-bearing refund ("cutback"). Ellingson shipped its logs from the Lassen Forest to Klamath Falls in accordance with this rate structure. The effect was to compel Ellingson to discontinue shipping lumber products into various western states, including the lucrative California market.

After completing its log shipments out of Lassen Forest on June 17, 1958, Ellingson filed a complaint with the Interstate Commerce Commission on June 26, 1958, charging that the GN-WP rates from the Jellico-Poison Lake area to Klamath Falls were unreasonable and discriminatory. Plaintiff sought a reduced, nondiscriminatory future rate and reparations for past injury based principally upon the excessive portion of the rates and interest on the "cutback" amounts held by the carriers.

The Interstate Commerce Commission rendered its final decision on April 29, 1960. *Ellingson Timber Co.* v. *Great Northern Ry.*, 310 I.C.C. 249 (1960). After considering, among other things, the rates applicable to KBPM on the Ash Creek to Klamath Falls route, it held that the rates charged Ellingson were

not excessive or discriminatory. However, it struck down the "cutback" provision to the extent it limited refunds to situations where the lumber products were shipped eastward on the GN or WP. In other words, the Commission required that "cutbacks" be equally refundable when these carriers were used for shipments elsewhere, including the lucrative California market. As a practical matter, however, this holding had no remedial economic value to Ellingson since the refund depended on the presence of a "through" rate as well, and there was, for example, no such rate applicable to the California route. Ellingson did not appeal the Commission's decision.

The joint rate in question has remained in effect up to the present time and has precluded petitioner from competing for the purchase of Lassen Forest timber (which has since been submitted for bids) and from competing in the California market for lumber products. Furthermore, in July of 1963 petitioner was compelled by these circumstances to liquidate most of its mill facilities in Klamath Falls.

On June 8, 1967, following the unfolding of subsequent events and the discovery of theretofore unknown facts, petitioner filed a private antitrust suit against respondents in the United States District Court for the District of Oregon. The complaint alleged that respondents engaged in conduct which violated Sections 1 and 2 of the Sherman Act and which, as a consequence, resulted in petitioner sustaining substantial damage to its business operations.

Other facts pertinent to this petition are disclosed in the discussion that follows.

REASONS FOR GRANTING THE WRIT

This Court has enumerated several reasons which *may* move it to exercise its sound judicial discretion to review a matter on writ of certiorari. One such reason is where a court of appeals

> . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.[1]

The district court in this case made certain critical rulings, affirmed by the court of appeals, which clearly call for the exercise of this Court's supervisory powers. The trial court flagrantly abused its discretion by prematurely and improperly segregating two affirmative defenses for separate trial, which led to summary disposition of a complex antitrust suit, without according petitioner the benefit of discovery on numerous factual matters inextricably related to both the allegations in the complaint and said defenses.

The district court also arrogated to itself the role of factfinder with respect to the segregated defenses despite petitioner's timely demand for trial by jury.

Another reason for review arises when a court of appeals ". . . has decided a federal question in a way in conflict with applicable decisions of this court."[2] Such a conflict resulted from the district court's ruling that, as a matter of law, it lacked jurisdiction to consider the legality under the antitrust laws of a conspiracy that had achieved its unlawful ends *partly*

[1] Rule 19(1)(b), Supreme Court Rules.

[2] *Id.*

through use of a common carrier rate that had previously been found consistent with the requirements of the Interstate Commerce Act.

Still another reason cited by this Court which *may* move it to grant a writ is where the court of appeals ". . . has decided an important question of federal law which has not been, but should be, settled by this court."[3]

The overriding importance of the Sherman Act as a "comprehensive charter of economic liberty" for the people of this country is not open to question. *Northern Pacific Ry.* v. *United States,* 356 U.S. 1 (1958). Consequently, any judicial interpretation in derogation of that Act involving questions of law which the Supreme Court has not previously ruled upon should be deemed to raise an "important question of federal law."

In this respect, the Court of Appeals for the Ninth Circuit has affirmed two lower court rulings which held that (1) the Clayton Act statute of limitations constitutes a bar to an antitrust suit where maintenance of a joint common carrier rate, an element in the alleged conspiracy, constitutes the only known "overt" act continuing into the limitations period; and that (2) the alleged possession of monopoly power by defendants during the four years preceding suit, in violation of Section 2 of the Sherman Act, coupled with plaintiff's presence in the market as an affected competitor, does not constitute sufficient overtness to sustain a cause of action against an asserted statute of limitations defense.

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[3] *Id.*

Granting the petition with respect to the foregoing issues will afford this Court the opportunity to ensure that the small private treble damage plaintiff is a fully respected litigant in the federal courts and that Section 4 of the Clayton Act will be the vital instrument of antitrust enforcement that Congress and this Court intended it to be.

I. The District Court's Segregation of Issues for Separate Trial, Without Permitting Petitioner Any Discovery on the Merits, Was Premature, Constituted an Abuse of the Court's Discretion, and Substantially Prejudiced Petitioner's Trial Preparations.

This petition presents a noteworthy instance of precipitous application of Rule 42(b) to segregate certain factual issues for separate trial.[4] The district court, on its own motion and at the very outset, segregated two issues for separate trial: (1) whether the pertinent statute of limitations barred petitioner's suit, and (2) whether petitioner's and respondents' prior involvement in a related matter before the Interstate Commerce Commission deprived the court of jurisdiction.

The premature segregation of issues in complex antitrust cases involving small private treble damage litigants is not an isolated occurrence. It is, there-

[4] This action may explain, in part, why, in addition to other grounds for review noted herein, there is a serious question as to whether the district court's opinion comports with the requirements of Rule 52(a) of the Federal Rules of Civil Procedure that the court make specific findings of fact and conclusions of law in all cases tried before it. Although this fact in itself is not necessarily enough to justify a review, it is, as demonstrated in this petition, one of a series of ill-considered actions which should motivate this Court to resolve the issues raised herein on the basis of full briefs and oral argument.

fore, of paramount importance for this Court to establish pretrial procedural standards which will ensure not only that such litigants are accorded substantial justice, but also that Section 4 of the Clayton Act shall be, as Congress and this Court have intended, a vital adjunct to the federal government's antitrust enforcement program.

The law, of course, is clear that the trial court has the power to segregate issues for separate trial. Rule 42(b) Fed. R. Civ. P. But this should be done only "... in furtherance of convenience or to avoid prejudice ...." *Id.* Moreover, while exercise of this power is discretionary with the court, the better and safer practice is to refrain from so exercising it, especially in complex antitrust cases. *Marks Food Corp.* v. *Barbara Ann Baking Co.*, 274 F.2d 934, 936 (9th Cir. 1959); *Frasier* v. *Twentieth Century-Fox Film Corp.*, 119 F. Supp. 495, 497 (D. Neb. 1954). Indeed, *any* summary disposition of antitrust cases is not generally favored. As this Court stated in *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962):

> [S]ummary procedures should be used *sparingly* in complex antitrust litigation where motive and intent play leading roles, *the proof is largely in the hands of the alleged conspirators*, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

(Emphasis supplied.) This is particularly so where, as here, discovery accorded petitioner was virtually nil. The law is equally clear that segregation of issues should not be ordered if it will prejudice a party to

the proceeding. *Marks Food Corp., supra; Frasier, supra.*

In this case, petitioner was substantially prejudiced by—and the trial court abused its discretion in—segregating the issues because the statute of limitations and jurisdictional issues involved sharply contested questions of fact which were inextricably related to the basic allegations of the case as a whole and because petitioner was from the very outset deprived of any meaningful pretrial discovery going into or beyond these two issues.

Whether the statute of limitations constituted a valid defense depended on petitioner's ability or inability to discover or establish innumerable varieties of possible overt acts pursuant to the conspiracy or of predatory conduct that occurred within the four years prior to the filing of the complaint. Whether the jurisdictional defense constituted a bar to suit depended on countless unresolved questions of fact which were related to practically all of the complaint's allegations and which could not be ascertained without broad discovery. Clearly, the segregation of and ruling on the jurisdiction issue was premature and erroneous in light of the minimal discovery allowed plaintiff. Plaintiff was entitled, by adequate discovery on the overall allegations in the complaint, to try to establish this "larger scheme" going well beyond matters in the Interstate Commerce Commission proceeding before having its complaint dismissed.

The trial court's sharp confinement of discovery was clearly contrary to the letter and spirit of the discovery provisions embodied in the Federal Rules of Civil Procedure. *Roebling* v. *Anderson*, 257 F.2d 615, 620 (D.C. Cir. 1958); *June* v. *Peterson Co.*, 155 F.2d

963, 967 (7th Cir. 1946); *SEC* v. *Los Angeles Trust D & M Exch.*, 24 F.R.D. 460, 463 (S.D. Cal. 1959). The district court's denial of meaningful discovery constituted an abuse of the court's discretion. *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947), made unequivocally clear the intended role of discovery in the federal courts:

> [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he had in his possession.

In *SEC* v. *Los Angeles Trust D & M Exch.*, *supra*, the court, in discussing the scope of discovery, stated:

> [W]e are of the opinion that discovery, however thorough, is a basic element of our Federal Civil Procedure, and is limited in theory only by the scope of protection afforded by the Fourth and Fifth Amendments of the Constitution; and in practice by the reasonable requirement that it not exceed the issues which are to be tried in the instant litigation.

24 F.R.D. at 463.

The courts have consistently recognized that liberal construction of the discovery rules is particularly appropriate in antitrust cases. *Alexander's Dep't Stores, Inc.* v. *E. J. Korvette, Inc.*, 198 F. Supp. 28 (S.D. N.Y. 1961); *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 23 F.R. Serv. 368 (S.D. N.Y. 1956); and *Leonia Amusement Corp.* v. *Loew's, Inc.*,

117 F. Supp. 747 (S.D. N.Y. 1954). Such cases are invariably unwieldy, complex and difficult to prove. The occasions are rare when a plaintiff can establish his case by simple, direct evidence. Most conspiracy or monopolization cases are established, if at all, after full discovery, by piecing together discovered evidence into a mosaic, as it were, from which the court may find from the fair preponderance of the evidence the alleged Sherman Act offense.

Against this backdrop, the following events occurred in the instant case which clearly establish that segregation of the above-mentioned affirmative defenses for separate trial without affording petitioner any discovery going beyond these issues constituted a gross abuse of the trial court's discretionary authority: The complaint was filed on June 8, 1967. A month and a half later, on July 27, 1967, respondents filed their respective answers thereto. Only eleven days later, on August 7, 1967, respondents took the deposition of one of petitioner's principal executive officers. Fourteen days later, on August 21, 1967, at the *first* court hearing in this case and *before* petitioner had obtained any discovery whatsoever, the trial court listened to respondents' suggestions of possible threshold issues of the statute of limitations and jurisdiction and immediately directed segregation of said issues for separate trial, sharply limiting discovery thereto.[5]

[5] It is difficult to explain the district judge's precipitate action in this regard except in terms of an inclination to cut short what promised to be a protracted, complicated, and—in his opinion—an unfounded antitrust suit. See, for example, the transcript of the *initial* court hearing wherein he "invited" respondents to move to dismiss the case. (Tr. of Proceedings August 21, 1967, at 2, which has been certified in this case.) See also his comments regarding the frivolous character of the suit and his disinclination ever to try the merits of the case. (App. 21a, 30a.)

Later, the court rejected petitioner's reasonable discovery efforts designed to elicit evidence highly relevant to the segregated issues as well as to the overall merits of its case.

That these efforts were "reasonable" is clear from a cursory review of petitioner's proposed interrogatories. (App. 51a-76a.) While at first blush they may appear to be burdensome, it is common experience that complex and unwieldy antitrust cases routinely require extensive discovery proceedings, including interrogatories, substantially broader than petitioner's. One can well envisage the sense of futility which befell petitioner at the initial court hearing when, instead of entering into customary discussions on the orderly development of pretrial discovery by all parties regarding the allegations in the complaint and the answers thereto, he was without warning confronted with the court's consideration of respondents' affirmative defenses and its decision, without briefs being filed, to limit discovery to said defenses.

That petitioner's discovery efforts were also designed to elicit highly "relevant" evidence or information which would lead to such evidence is equally clear from random examples of petitioner's interrogatories which were arbitrarily rejected (57 out of 63) by the court. For example, Interrogatory No. 6 sought, among other things, correspondence during the relevant period between GN and WP officials relating to petitioner. (App. 53a-54a.) The complaint specifically alleges that these same companies, within four years prior to the filing of the complaint, had engaged in concerted action to drive petitioner out of business. Such correspondence may well have constituted evidence or have led to evidence going to the very heart

of petitioner's case and, in particular, to rebuttal of respondents' segregated affirmative defenses.

Also, Interrogatory No. 48 sought, among other things, the names of employees of GN and WP, during the relevant period, who held meetings on the subject of log rates in the pacific northwest. (App. 70a.) Petitioner's complaint charged, *inter alia*, that GN and WP, as well as others, conspired to drive petitioner out of business by various means, including the fixing of unfair and arbitrary rates which made it difficult for petitioner to compete. Names of the railroad officials who might have known how, why and which employees of respondents established certain rates for logs shipped to Klamath Falls by petitioner and its competitor from the Lassen Forest and Ash Creek areas, respectively, was vital to petitioner's trial preparations, both as to its case-in-chief and to its rebuttal, including the segregated defenses.

Further, Interrogatory No. 56 sought, among other things, information regarding rebates or credits issued by GN during the *relevant period* and in the relevant market. (App. 73a.) The complaint alleged that among the activities respondents engaged in pursuant to the conspiracy was preferential treatment of petitioner's competitor, KBPM, which was owned by GN. It is difficult to discern how an interrogatory could be more relevant to the factual allegations in the complaint and the questions of fact raised by the segregated issues.

Finally, Interrogatory No. 35 simply requests the names of GN officials who participated in the decision leading to the establishment of log rates for petitioner. (App. 65a.) What could be more relevant to a case in which the complaint charged a conspiracy to drive

petitioner out of business by imposing onerous rates upon petitioner while granting preferential rates to its competitor, than the names of GN officials who were in a position to know whether this was so? Petitioner was entitled to at least try to obtain from these officials testimonial or documentary evidence probative of such factual allegations in the complaint or of the segregated issues.

Moreover, the highly limited discovery which petitioner was actually accorded in this case consisted, in large measure, of a few innocuous interrogatories, the answers to many of which were predictable. Nor were they significantly material to the segregated issues or to the factual allegations in the complaint. Respondents were simply not compelled to answer the extremely vital and relevant interrogatories which would have enabled petitioner to notice depositions and engage in searching examination of respondents' employees in an effort to establish the overall merits of its case as well as to rebut the affirmative defenses.

It is submitted that proceedings in this case do not conform to established notions of fairness or good practice in the federal trial courts. The correct notion is that articulated in the *Frasier* case, *supra:*

> [T]he trial piecemeal of separate issues in a single suit is not the usual course. It should be resorted to only in the exercise of *informed discretion* and in a *case* and at a *juncture* which move the court to conclude that such action will readily further convenience or avoid prejudice.

(119 F. Supp. at 497; emphasis supplied.)

Segregation in the present case occurred prematurely, abruptly and without the barest exercise of *informed* discretion. It should not be left to stand

as approved by the court of appeals. The court's segregation of issues for separate trial was not based on "informed discretion", since it was done at the outset of the initial hearing without the matter being properly briefed; or done in a proper "case", since this was a complex antitrust suit; or ordered at the proper "juncture", since petitioner had not, as yet, had the benefit of any discovery which might have shed some light on the scope of factual matters related to the segregated issues or to the allegations in the complaint.

All petitioner sought was a reasonable opportunity, by utilizing the liberal rules of discovery, to develop evidence probative of its case and to rebut the issues segregated for separate trial—an opportunity which it was arbitrarily denied. The foregoing conduct represents such a stark departure from the accepted and usual course of judicial proceedings as to warrant this Court's exercise of its supervisory powers over the federal judiciary.

II. The Lower Courts Plainly Ignored the Facts and Established Precedent in Dismissing Petitioner's Allegations of Sherman Act Violations on the Basis of a Prior Interstate Commerce Commission Proceeding Involving the Same Rates.

Petitioner was foreclosed from a legitimate business venture by prohibitive railroad tariffs. He complained to the Interstate Commerce Commission that the tariffs were illegal under the Interstate Commerce Act. The Commission held that the tariffs were not illegal under *that* Act. Petitioner subsequently filed an antitrust suit alleging that the onerous tariffs resulted from a conspiracy by the respondent-carriers to restrain him from competing and to monopolize the relevant market

for the benefit of a competing lumber mill affiliated with one of the carriers.

The lower courts found lack of jurisdiction to entertain the antitrust complaint because the Commission had previously ruled upon these same rates.

The district court saw the issue squarely:

> whether—"*all* of defendants' alleged illegal activities concern rates which the Interstate Commerce Commission approved."

(App. 77a; emphasis supplied. *See also* App. 78a.) Finding that they did,[6] the court concluded it lacked

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[6] Here the court strained to overlook the testimonial evidence of petitioner's principal executive officer, Robert P. Ellingson, Jr., whose deposition was taken before plaintiff had had the benefit of any pretrial discovery whatsoever. (Def.'s trial exhibit 31.) Mr. Ellingson's testimony alleged at least the following facts which were completely uncontroverted at trial and which are instructive as to the substantially different and greater scope of the antitrust complaint: (1) that GN threatened to deprive Ellingson of freight cars unless Ellingson gave GN all its shipments to the east (p. 52, lines 4-6; p. 59, lines 6-13); (2) that GN cut the log rate from Ash Creek to Klamath Falls for the benefit of its own mill (p. 52, lines 7-11; p. 58, lines 2-12); (3) that Ellingson was deprived of a log dump and required to pay switching charges not imposed on other shippers (p. 61, lines 13-25 to page 62, lines 1-13; p. 63, lines 2-21; p. 64, lines 6-19; p. 68, line 25; p. 69, lines 1-13); (4) that GN furthered its conspiracy to drive Ellingson out of business by selling a competing saw mill at Klamath Falls at a price far below the market value of the property and without giving competing mills an opportunity to bid thereon (p. 80, lines 4-25 to p. 81, lines 1-25 to p. 82, lines 1-25); (5) that GN engaged in an unfair business practice in the manner in which it leased its saw mill in Klamath Falls and in giving preferential rates to the operator thereof (p. 86, line 24 to p. 88, line 10; p. 90, lines 11-23, p. 111, lines 3-14); (6) that defendants restrained Ellingson from marketing products except in certain designated and prescribed areas (p. 91, lines 11-25); and, (7) that defendants refused to extend the same facilities and terms to petitioner which were extended to petitioner's competitors (p. 105, line 4 to p. 106, line 1).

jurisdiction to consider possible application of the Sherman Act to allegations that the "legal" tariffs were part of a conspiracy to destroy petitioner and monopolize the relevant market in which petitioner was competing with defendant GN's affiliate.

This case, despite the terminology loosely applied in the lower courts, was not argued below on an issue of *primary* jurisdiction, *i.e.*, it was never asserted that rates subject to administrative regulation were the "sole" or "primary" issue in the case and thus compelled *initial* proceedings by the regulating agency. *United States* v. *Radio Corp. of America*, 358 U.S. 334, 348 (1959); *Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U.S. 481, 498-99 (1958); *Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952); *Riss & Co.* v. *Ass'n of American R.R.*, 170 F. Supp. 354 (D. D.C.), 267 F.2d 659 (D.C. Cir.), *cert. denied*, 361 U.S. 804 (1959); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Aircoach Transp. Ass'n*, 253 F.2d 877 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 930 (1960).

No one suggested suspending district court proceedings in favor of *preliminary* agency consideration. After all, there had already been administrative proceedings in this case concerning the legality of the pertinent rates under the Interstate Commerce Act. Of course, the Commission had *not* considered application of the antitrust laws, and rightly so. As this Court has made clear: The Commission is not empowered to interpret or enforce the antitrust laws. *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439 (1945); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944).

If, then, the antitrust issues were not before the Commission and that body had completely exercised its administrative function in the case, where was any jurisdictional basis for dismissing the antitrust suit?

What the courts below *did*, somehow, was to read the antitrust allegations entirely out of the complaint. They viewed the complaint simply as charging discriminatory rates under the Interstate Commerce Act. To the extent the Commission had previously held part of the tariff—the "cutback" provision—illegal, there was, the court reasoned, an "election of remedies" under applicable statutes and cases (49 U.S.C. § 9; *Standard Oil Co.* v. *United States*, 283 U.S. 235, 240-41 (1931)) which, again, had nothing whatsoever to do with an antitrust cause of action.

The question at this juncture is not whether a rate we assume is legal under the Interstate Commerce Act can nevertheless be illegal under the Sherman Act. This Court and many others have answered that question affirmatively on numerous occasions. *Riss & Co.* v. *Ass'n of American Railroads, supra; Noerr Motor Freight, Inc.* v. *Eastern R.R. Presidents Conference*, 155 F. Supp. 768, 814-16, 822-25 (E.D. Pa. 1957), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961); *cf. United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Maryland & Virginia Milk Producers Ass'n, Inc.* v. *United States*, 362 U.S. 458 (1960). The *Keogh*[7] *Terminal Warehouse*[8] line of cases relied upon by the courts below are irrelevant here. In the

[7] Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922).

[8] Terminal Warehouse v. Penn. R.R., 297 U.S. 500 (1936).

latter case Justice Cardozo explicitly excluded from those holdings a case where a carrier had confederated with a competitor of the complaining shipper to restrain competition or foster a monopoly. In such a case, he wrote:

> [T]he carrier would make itself a participant in the monopoly it had conspired to produce, *though its only overt act was a discriminatory rate of carriage.*

(297 U.S. at 515; emphasis supplied.)

The question, again, is simply whether the lower courts were correct in ignoring entirely the antitrust aspects of the complaint. This necessarily relates back to the district court's segregation of issues for separate trial.

If the court were correct in requiring petitioner to prove its entire antitrust case after discovery which was sharply limited to the two segregated issues, then the court might legitimately have found that no substantial antitrust allegations had been *proved* at that juncture. If that were all the "trial" petitioner could expect, then the court could properly dismiss the complaint as unsupported by sufficient evidence. But there was no imaginable basis for the court to dismiss the complaint on *jurisdictional* grounds.

The sheer and simple *wrong* of the lower courts' reasoning on the jurisdictional issue should warrant review by this Court in the exercise of its supervisory responsibility over the federal judiciary. *Brunner* v. *United States*, 343 U.S. 112 (1952). Also, such review is warranted because the lower courts have decided a federal question in a way which directly conflicts with applicable decisions of this Court. In this respect, despite its confusion, the case provides a precedent

that should not be permitted to stand. As more and more of the important antitrust cases coming before the courts involve companies in regulated industries,[9] precedents such as the instant case, as decided thus far, cannot help but have a confounding and inhibiting effect.

III. The Lower Courts' Application of the Clayton Act's Statute of Limitations Was Incorrect on the Facts and Law and Constitutes a Stifling Precedent for Private Antitrust Enforcement.

This Court has often stressed the vital role of private antitrust actions in furthering antitrust policy, and it has expressed concern lest lower court decisions inhibit private enforcement.[10] Yet despite countless private suits that have at once revealed, halted and punished serious incursions on the public interest, some lower courts continue to treat the treble damage plaintiff as a second-class litigant. This petition presents a prime example. And the lower courts' disposition of the statute of limitations issue in this case

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[9] *See* Federal Maritime Comm. v. Aktiebolaget Svenska Amerika Linien (Swedish American Line), 390 U.S. 238 (1968); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Far East Conference v. United States, 342 U.S. 570 (1952); Kaplan v. Lehman Bros., 250 F. Supp. 562 (N.D. Ill. 1966), *aff'd*, 371 F. 2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967); *Symposium: Antitrust and Monopoly Policy in the Communications Industries*, 13 ANTITRUST BULL. 871 (1968).

[10] Perma Life Mufflers v. International Parts, 392 U.S. 134, 136 (1968); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, *reh. denied*, 393 U.S. 901 (1968); Leh v. General Petroleum Corp., 382 U.S. 54 (1965), *reh. denied*, 382 U.S. 1001 (1966); Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965).

is a prime example of shortcut legal reasoning aimed at ridding the docket of a complicated and potentially protracted antitrust suit.

Admittedly, application of the Clayton Act's four-year statute of limitations has offered many courts a fertile field for shortcut reasoning.[11] This, quite apart from the injustice in the present case, is ample reason for this Court to grant the instant petition and provide much-needed guidance to the lower courts on statute of limitations issues in private antitrust actions.

The district court dismissed petitioner's complaint on the ground, *inter alia*, that "overt" acts alleged to have been committed by the defendants ceased more than four years prior to the filing of the complaint. Concededly, injury to the petitioner—culminating in the liquidation sale of its affected facility—occurred within the statutory period. Concededly, the complaint *alleged* acts in furtherance of an illegal conspiracy by defendants continuing into the statutory period.[12] Further, although it was completely ignored by the lower courts, the complaint alleged monopolization and attempts to monopolize continuing *into* the statutory period.

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[11] *See* Millstein, *Current Status of Affirmative Defenses, Including the Passing-on Defense, in Pari Delicto and Statutes of Limitations*, 38 A.B.A.J. ANTITRUST L.J. 111 (1969).

[12] Petitioner alleged, and was prepared to rely upon evidence of, acts occurring more than four years prior to the filing of the complaint to establish defendants' violations of the Sherman Act. Such evidence, while entirely admissible, Dovberg v. Dow Chemical Co., 195 F. Supp. 337, 343 (E.D. Pa. 1961), *aff'd*, 353 F.2d 963 (3d Cir. 1965), *cert. denied*, 384 U.S. 907 (1966), was not the basis for petitioner's allegations of overt acts and injury within the limitations period. Yet the district court considered *only* this evidence with respect to the limitations defense.

These allegations alone place the bare complaint beyond any defense based upon the Clayton Act's statute of limitations. If, however, the district court was within permissible bounds in segregating the limitations issue for separate trial and if the proceeding held by the court on March 4, 1968, could be seriously construed as an adequate trial, then we must disregard the quite ample allegations of the complaint and consider whether on the facts stipulated or proved at "trial" there were overt acts *and* resulting injury to petitioner within four years prior to suit. There is no quarrel over injury. The issue on the facts in evidence at trial is whether *maintenance* of the joint rate, which petitioner alleged as *an* act in furtherance of the illegal conspiracy, was itself "overt".

This case is particularly suited for review because the court of appeals' decision establishes the highly undesirable precedent that *maintenance* of a joint rate by regulated common carriers in furtherance of an illegal conspiracy is not an "overt act" for purposes of the statute of limitations. While purporting to follow the long line of "continuing conspiracy" authorities in which the courts have confined the period of liability based upon positive conduct by conspirators,[13] the court of appeals here clearly broke new ground in treating the continuing and publicly notorious barrier of a predatory common carrier rate as devoid of "overt" qualities.

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[13] *See, e.g.*, Crummer Co. v. DuPont, 223 F.2d 238 (5th Cir.), *cert. denied*, 350 U.S. 848 (1955); Susser v. Carvel Corp., 206 F. Supp. 636 (S.D. N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965); Service Stages, Inc. v. Greyhound Corp., 170 F. Supp. 482 (N.D. Ga.), *aff'd*, 268 F.2d 739 (5th Cir. 1959); Emich Motors Co. v. General Motors Corp., 15 F.R.D. 354 (N.D. Ill. 1955), *aff'd*, 229 F.2d 714 (7th Cir. 1956).

Contrary to the understanding of the courts below that petitioner's case rested upon an interpretation of overtness confined to criminal cases, petitioner is content with the requirement that it prove overt acts *and* injury within four years preceding the filing of the complaint.[14] We need only urge recognition of the overtness implicit in the "continuing and accumulating harm"[15] imposed by an illegal common carrier rate on a shipper, the petitioner, who during the four years preceding suit was capable and desirous of competing in a market foreclosed, in part, by that rate.

This Court recently recognized in the *Hanover Shoe* decision the continuing overt nature over some 43 years of an illegal corporate *policy* not to sell particular equipment but only to lease it. The policy, like the rate, was a silent, unyielding dead weight on competition—requiring no periodic action or maneuver to effectuate. The difference between the policy in

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[14] Garelick v. Goerlich's, Inc., 323 F.2d 854 (6th Cir. 1963); Steiner v. Twentieth Century-Fox Film Corp., 232 F.2d 190 (9th Cir. 1956); Laitram Corp. v. Deepsouth Packing Co., 279 F. Supp. 883 (E.D. La. 1968); Delta Theatres v. Paramount Pictures, 158 F. Supp. 644 (E.D. La.), *appeal dismissed*, 259 F.2d 563 (5th Cir. 1958); Winkler Koch Eng'r Co. v. Universal Prod. Co., 96 F. Supp. 1014 (S.D. N.Y. 1950), *aff'd on rehearing*, 100 F. Supp. 15 (S.D. N.Y. 1951). The confusion in the most frequently cited cases, primarily district court decisions, is dramatically illustrated in the disjointed analysis below. While many opinions agonize over the simple principle of the concurrence of overt act and injury, *e.g. Laitram*, *supra*, at 887-91; *Emich*, *supra*; Farbenfabriken Bayer v. Sterling Drug, Inc., 197 F. Supp. 627 (D. N.J. 1961), *aff'd*, 307 F.2d 210 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), never yet in an antitrust context has a court gone to some pain to analyze what an overt act is, or, more importantly, what, as a matter of antitrust policy, we should encompass within that term.

[15] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 502, n. 15, *reh. denied*, 393 U.S. 901 (1968).

Hanover and the rate in this case is that while the policy only *inhibited* competition, the rate *prevented* competition during the four years preceding suit. Thus the instant case offers a stronger basis than *Hanover* for finding the requisite continuing overtness.

This reasoning need not leave open forever the limitations period in antitrust causes based upon rates illegal under Section 1 of the Sherman Act. In monopoly cases under Section 2 of the Act, it is well established that the continuing overtness inherent in the existence of monopoly power must be accompanied by the existence of competitive capability on the part of the injured party.[16] Had petitioner retired from all competitive activities in the relevant market five years before filing suit and had it sold its facilities two years later, within the limitations period, the cause of action presumably would not survive the limitations defense. But, in fact, within four years preceding its complaint, petitioner was not only capable of competing with the mill affiliated with the defendants but was in open competition with it.[17] There is no reason to apply a different rule here where Section 1 of the Sherman Act is the basis of the lower courts' ruling than where continuing monopoly power is at issue under Section 2.[18]

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[16] *See, e.g.*, La Rouche v. United Shoe Mach. Corp., 166 F. Supp. 633 (D. Mass. 1958).

[17] Plaintiff's Exhibit Nos. 3 and 4 in the district court show that considerable Lassen Forest timber was available to petitioner between 1961 and 1966 if it could have been shipped on defendants' facilities and that considerable competitive shipments were made by defendant GN's affiliated mill into the western markets from which petitioner was foreclosed.

[18] *See* Highland Supply Corp. v. Reynolds Metals Corp., 327 F.2d 725 (8th Cir. 1964).

This court should also take notice of the fact that the complaint in this case alleged the possession of monopoly power by defendants during the four years preceding suit in violation of Section 2 of the Sherman Act. As the court held in *Highland Supply*, such power, coupled with petitioner's presence in the market as an affected competitor, is itself sufficient overtness to sustain the cause of action. But the lower courts completely overlooked this element in the case.

This Court's responsibility to supervise the federal courts, as well as its reluctance to allow such obvious error to stand, should militate strongly in favor of granting this petition.

IV. Petitioner Was Deprived of and Did Not Waive Its Constitutional Right to Trial by Jury on the Segregated Factual Issues.

In the proceedings below the plaintiff was deprived of its constitutional right to have a jury determine the relevant issues of fact. The right was not waived as the Court of Appeals for the Ninth Circuit held. (App. 84a.)

Questions of fact in private antitrust actions are triable before a jury, *Fleitman* v. *Welsbach Street Lighting Co.*, 240 U.S. 27, 29 (1916), and this right applies fully to preliminary procedural matters and affirmative defenses if there are, as here, material factual issues presented. *Bertha Building Corp.* v. *National Theatres Corp.*, 248 F.2d 833 (2d Cir. 1957), *modified on rehearing on other grounds, cert. denied*, 356 U.S. 936 (1958); *Marks Food Corp.* v. *Barbara Ann Baking Co.*, 274 F.2d 934 (9th Cir. 1959). Once proper demand for jury trial is made it can only be lost by *express* consent of the demanding party. *Scott* v. *Neely*, 140 U.S. 106, 109-10 (1891).

Demand for jury trial was properly and timely made and served in the present case. The complaint was captioned "Action At Law for Monopoly and Restraint of Trade and Attempted Monopolization and *Request for Jury Trial.*" (App. 7a; emphasis supplied.) At the end of the complaint the further notation appears: "Plaintiff respectfully requests a trial by jury." (App. 14a.) The jury demand was noted on the docket pursuant to Rule 39(a). (App. 1a.) By the explicit terms of the Federal Rules and the cases decided thereunder, waiver of this properly asserted right could have been made only by a written stipulation on petitioner's part and filed with the court or by an oral stipulation made in open court and entered on the record. (Fed. R. Civ. P. 39(a).) Neither occurred in the instant case. The district court never even considered whether the "trial" on the segregated issues could be held without a jury in view of petitioner's demand.

The Court of Appeals for the Second Circuit has upheld the right to a jury trial where these waiver provisions have not been exercised, even in situations when, as in the present case, the issue of the empaneling of a jury was not raised again after the initial demand was made. In *DeGioia* v. *United States Lines Co.*, 304 F.2d 421 (2d Cir. 1962), the court said that the "[defendant] had never withdrawn its claim for a jury trial and was therefore entitled to such a trial. F.R. 39(d), 39(a).[1] "[19]

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[19] The indicated footnote 1 states:

> After making its initial demand, [defendant] apparently did not explicitly raise the question again. The court . . . determined that the third-party action would be tried to the jury in an advisory capacity and on a separate charge. Both

The right to a jury trial is so fundamental that a very strong presumption is entertained against its waiver. *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935). In *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), this Court stressed the special importance of jury trial in antitrust cases and, significantly, noted that the discretion granted by Rule 42(b) could not be used to "compel Beacon to split his antitrust case, trying part to a judge and part to a jury." *Id.* at 508.[20]

The district court may well have been confused initially as to whether it was segregating legal issues for summary judgment or factual issues for separate trial. This confusion apparently facilitated the court's failure to take cognizance of petitioner's jury demand, even though it was clear that the statute of limitations and jurisdictional issues were permeated with unresolved factual issues going to the very heart of the

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> [defendants] objected to this, but the grounds of the objection were unclear. While [defendant's] failure explicitly to urge its original demand [for jury trial] in the subsequent proceedings added to the confusion surrounding the issue of jury trial, it cannot be considered a waiver of this vital and cherished right. *The principle of waiver by failure to make timely claim, F.R. 38(d), is limited by the explicit provision of F.R. 39(a), that once a demand for jury trial has been made it can be waived only by an oral stipulation made in open court and entered on the record or by written stipulation.* (Emphasis supplied.)

[20] The discretion given the trial judge under Rule 42(b) does not include the power to abrogate the right to a jury trial. Rather, that rule specifically retains that right:

> The court . . . may order a separate trial of any claim . . . or of any separate issue . . . *always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.*

Fed. R. Civ. P. 42(b). (Emphasis supplied.)

antitrust allegations. *See Andreas* v. *Imperial Airlines, Inc.*, 211 F. Supp. 311, 313 (E.D. Pa. 1962). The district court seemed to sense the existence of disputed factual issues. Following its initial "invitation" to respondents to move for dismissal of the case,[21] the court subsequently executed an aboutface, noting that:

> [T]his is a dangerous case to try on a motion to dismiss and summary judgment. I am going to set it down for pretrial. *You can set out all these facts.* Then we are going to have segregated issues on some of these defenses. We are going to have a trial on the statute of limitation. We will have a trial on the issue of whether these acts were within the jurisdiction of the Interstate Commerce Commission. (Tr. of Proceedings August 21, 1967, at 4; emphasis supplied.)

Defendants' counsel also seemed to sense this:

> MR. CORY [in response to the court's inquiry]: Well the Court's jurisdiction over a regulated industry is not a question of law in a vacuum. It is—*it has to be looked at in the contention of the particular complaint for treble damages.*

(App. 17a; emphasis supplied.)

In spite of this recognition, the trial judge violated both the dictates of the rule under which he purported to act and the binding precedent in his Circuit. *Marks-Food Corp.* v. *Barbara Ann Baking Co.*, 274 F.2d 934 (9th Cir. 1959). In that case, which is strikingly similar to this one, the Ninth Circuit held that where grocers brought a private antitrust action against a bakery and demanded a jury trial, it was error for the trial judge to try the issue of subject matter juris-

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[21] *Supra*, note 5.

diction (interstate commerce) separately and ahead of the other issues in the case without the aid of a jury. The court so held largely because Rule 42(b) "does not sanction the switching of the separated issues in a jury case from the jury to the judge" and because it is not proper "to separate the subject matter jurisdiction issue for separate trial in cases where the factual merits of the case must be considered in deciding the separated issue." 274 F.2d at 936.

The trial judge was apparently impervious to this clear and binding precedent, since he nevertheless proceeded to hold a trial involving disputed issues of fact clearly within the province of a jury. This constituted a radical departure from the accepted and usual course of judicial proceedings. It should have been corrected by the court of appeals *sua sponte* just as it should have been *noticed* by the trial court on its own initiative. Such fundamental rights should not be so lightly waived or so easily overlooked. In keeping with the spirit of Rule 19, this Court should correct this serious deprivation of a constitutional right as one of several serious derelictions in the conduct of this case.

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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September 18, 1970

APPENDIX A

District Court Docket Entries

DATE; PROCEEDINGS.

1967

June 8—Filed Complaint and Demand for Jury Trial *

June 8—Issued summons to Marshal

June 16—Filed Summons with Marshal's return

June 27—Filed Stipulation that deft., Great Northern Railway Co., may have to and including July 27, 1967 within which to make an appearance, with Clerk's endorsement granting stipulation

June 28—Filed Stipulation that defendant Western Pacific Railroad Co. may have an extension of time to and including July 27, 1967, within which to appear, with Clerk's endorsement granting stipulation

*July 27—Filed Answer of Deft Great Northern R.R. Co.**

*July 27—Filed Answer of Deft Western Pacific R.R. Co.**

[Aug. 7—On this date defendants took the deposition of Robert P. Ellingson, Jr., Plaintiff's chief operating officer]

Aug. 21—Entered Order setting for pretrial on segregated issues 10/16/67 *

Aug. 21—Pretrial order to be submitted on issues of Statute of Limitation and question of jurisdiction

Aug. 25—Filed Interrogatories

Sept. 1—Filed Objections of Great Northern Railway Co. to Interrogatories

Sept. 5—Filed Answers of Defendant, Great Northern Railway Company to Plaintiff's Interrogatories

Sept. 7—Filed Clerk's Copy of Reporter's Transcript of Proceedings, dated 8/21/67

Sept. 7—Entered Order resetting objections to interrogatories to 9/25/67

Sept. 25—Record of hearing on Objection to Interrogatories

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*Emphasis supplied.

Sept. 25—Entered Order taking under advisement

Sept. 27—Entered Order setting hearing on pending objections to interrogatories before Judge Solomon 10/16/67, 1:30 p.m.

Sept. 27—Filed Plaintiff's Motion to Change place of trial from Portland, Oregon to Medford or Eugene, Oregon

Oct. 12—Filed Points and Authorities of Great Northern Railway Company in Support of Objections to Interrogatories

Oct. 16—Record of Pretrial Conference

Oct. 16—Record of hearing on Objections to Interrogatories and Motion to Change Place of Trial.

Oct. 16—Entered Order allowing plaintiff 2 weeks to revise interrogatories, to 10/30/67

Oct. 16—Entered Order resetting for Call 12/18/67 at 10:00 A.M.

Oct. 25—Filed Supplemental Answer of Deft. Great Northern Railway Co. to Plff's Interrogatory No. 1

Oct. 25—Filed Interrogatories Relating to Jurisdiction to Great Northern Railway Co.

Nov. 6—Filed Answers of Deft Great Northern Railway Co. to Pltff's Interrogatories Relating to Jurisdiction

Nov. 6—Filed Objections of Great Northern Railway Co. to Pltff's Interrogatories Relating to Jurisdiction

Nov. 14—Filed Statement and Memorandum with respect to interrogatories relating to jurisdiction

Nov. 20—Record of hearing on Objections to Pltff's Interrogatories relating to jurisdiction

Nov. 20—Entered Order that if counsel cannot determine matter deft. should file argument and briefs by 11/27/67; ptff file arguments and briefs by 12/4/67 and these arguments and briefs will be referred to Judge Solomon for a ruling

Dec. 18—Filed Notice of Hearing (1/8/68)

Dec. 18—Entered Order that Pretrial Order by lodged by 1/15/68

Dec. 18—Entered Order that Judge Solomon give case a trial date when PTO lodged

Dec. 20—Lodged Pretrial Order with Respect to Court's Jurisdiction Over the Subject Matter

Dec. 21—Entered Order setting for pretrial conference and hearing on Objections to Interrogatories on Tuesday, 1/2/68, at 9:00 A.M.

1968

Jan. 2—Record of pretrial conference.

Jan. 2—Entered Order that parties re-type draft of pretrial order and submit Jan. 5, 1968.

Jan. 2—Entered Order that Roger Tilbury file supplemental list of Interrogatories relating to question of jurisdiction.

Jan. 2—Entered Order segregating issues of Statute of Limitation and Jurisdiction.

Jan. 2—Entered Order setting for trial week of March 4, 1968, on segregated issues; setting for final pretrial conference Jan. 29, 1968, at 9:30 A.M.

Jan. 29—Pretrial Order Lodged.

Jan. 29—Record of Pretrial Conference.

March 1—Lodged Plaintiff's ~~Memorandum~~ Regarding Statute of Limitations Defense.

March 1—Record of pretrial conference (Briefs submitted)

March 4—Record of trial before the Court

~~Pretrial Order signed, entered and filed~~

Evidence adduced by plaintiff (Has burden of proof)

ORDER CASE SUBMITTED ON THE MERITS

March 5—Lodged Supplemental Memorandum of deft Great Northern Railway Co. as to Statute of Limitations

March 5—Lodged Plaintiff's Supplemental Memorandum Regarding the Statute of Limitations Defense.

March 5—Filed Plaintiff's Response to Supplemental Memorandum of Defendant, Great Northern, Relating to Limitations.

March 15—Lodged Reply of Western Pacific to Plaintiff's Supplemental Memoranda.

March 27—Filed Transcript of Proceedings, March 4, 1968.

June 20—Filed Praecipe (Letter) to issue two new sets of Summons.

June 21—Issued Summons to Marshal for service on Western Pacific Railroad Co., San Francisco. Four week.

June 21—Issued Summons to Marshal for service on Western Pacific Railroad Co. by serving Corporation Commissioner.

June 20—Filed and Entered Opinion and Order.

(m 6/21/68)

June 20—Filed and Entered Judgment of Dismissal.

July 16—Filed plaintiff's notice of appeal—copies mailed to counsel

July 16—Filed undertaking on appeal (attached to notice)

July 23—Filed Summons with Marshal's return. (Corp. Comm.)

Filed Summons with Marshal's return.

July 29—Filed Motion of deft. Western Pacific Railroad Co. to Quash Summons and Service of Complaint.

Aug. 12—Entered Order that defendant's motion to quash summons, etc. is allowed.

Aug. 14—Filed and Entered Order allowing deft's motion to quash.

Aug. 20—Filed Stipulation re retaining records on appeal until final brief

Aug. 21—Filed and entered Order to retain record on appeal

Aug. 22—Mailed certified copy order retaining record and transcript of docket entries to Court of Appeals. Counsel notified.

Aug. 23—Filed supplemental transcript of proceedings October 16, 1967 and January 2, 1968

Sept. 13—Filed Designation of parts of the record to be included in the appendix.

Sept. 13—Filed Statement of the Issues upon which plaintiff intends to present for appellate review

1969

June 4—Mailed original and one copy clerk's record on appeal, original and one copy reporter's transcript of proceedings of March 4, 1968 to Court of Appeals at the request of counsel for appellant. Counsel notified. All Exhibits mailed to Court of Appeals.

July 25—Mailed following memorandums to Court of Appeals pursuant to request of Mr. Cosgrave: Plaintiff's Memo. Re Statute of Limitations, Pltf's. Memo Re Primary Jurisdiction Defense, Pltf's Supp. Memo RE Primary Jurisdiction Defense, Pltf's. Response to Supp. Memo of Def. Great Northern, Relation to Limitations. Counsel notified.

1970

May 25—Received and filed Judgment, Original Record, Exhibits, and Transcript of Proceedings dated March 4, 1968, (one volume) from Court of Appeals

May 25—Filed Opinion

May 25—Filed Cert copy of Judgment affirming decision of District Court; costs in Court of Appeals in favor of the appellees and against the appellant (brief of appellee Western Pac. $330.00; brief of appellee Great North $245.70—total of $575.70)

APPENDIX B

Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 67-316

ELLINGSON TIMBER CO., Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation; WESTERN PACIFIC RAILROAD COMPANY, Defendants.

Action at law for monopoly and restraint of trade and attempted monopolization and request for jury trial.

For cause of action, plaintiff respectfully alleges:

I.

Jurisdiction

Jurisdiction is founded upon the Sherman Act, Ch 647, 26 Stat. 209, July 2, 1890, Title 15 U.S.C. #1-8, and upon subsequent amendments thereto, and upon the presence of a federal question, as well as diversity of citizenship.

II.

Venue

Venue is founded on U.S.C. Title 28, #1391, and the fact that defendant, Great Northern Railway Company, is a Minnesota corporation with its principal office in St. Paul, Minnesota, and engaged in business in Oregon, while defendant, Western Pacific Railroad Company, is a California corporation, with its principal office in San Francisco, California, and is engaged in business in Oregon. Plaintiff is an Oregon corporation and is engaged in business principally in this State.

III.

Parties

(a) Plaintiff, Ellingson Timber Co., is an Oregon corporation, which for many years operated lumber mills in the vicinity of Klamath Falls, Oregon, among other locations.

(b) Defendant, Great Northern Railway Company, is a Minnesota corporation.

(c) Defendant, Western Pacific Railroad Company, is a California corporation.

IV.

Definitions

The term, "Defendant" or "Defendants" or "conspirator" or "co-conspirators" shall include all subsidiaries and other affiliated companies which it, he or they control or operate. It shall also include all acts committed by its, his or their employees, servants, agents or representatives acting within the scope of their employment for defendant or defendants. The term, "Great Northern" shall refer to defendant, Great Northern Railway Company. The term "Western Pacific" shall refer to defendant, Western Pacific Railroad Company.

V.

Commerce

Defendant, Great Northern Railway Company, is one of the largest rail carriers in the United States, operating a railroad system in excess of 8,200 miles principally through the North Central plains and Pacific Northwest, and with a senior working capital in excess of $200,000,000, and annual gross revenues which normally exceed $250,000,000. Much of this revenue is derived from the interstate transportation of commodities and passengers in interstate com-

merce between the several states serviced by the Great Northern. Among other multitudinous products transported by the Great Northern are lumber and timber and related products, iron ore, wheat, barley and rye, which represent some of its largest revenue items. Great Northern has close affiliations with the Northern Pacific Railway Company and with Chicago, Burlington & Quincy Railroad Company, both substantial carriers in their own right.

Defendant, Western Pacific Railroad Company, operates a railroad system of more than 1300 miles, principally from Oakland, California to Salt Lake City, Utah, with numerous connecting lines and feeders. It also provides a link in a through route to Chicago, Illinois, and forms the center link of an important north-south route along the Pacific Coast. It has a senior capital in excess of $66,000,000, and has a gross annual revenue which has exceeded $60,000,000 in recent years. Most of the transportation which it provides consists of products which move in the channels of interstate commerce. Some of the chief products which it transports are lumber and timber and related products, food and food products, primary metals, vehicle and vehicle parts. Western Pacific has also pursued an active course of acquiring proprietary interests in other railroad companies. Among other such interests, Western Pacific is reported to own more than 450,000 shares of stock in the Atchison, Topeka and Santa Fe Railway Company (the largest road in mileage in the United States), 35,000 shares of the Northern Pacific Railway Company (a close affiliate of defendant, Great Northern Railway Company), and 22,800 shares of Southern Pacific Company (which operates a system of more than 14,000 miles). In these three carriers, defendant, Western Pacific, has investments of approximately $21,000,000.

In connection with the conduct of its business, plaintiff and its assignee, Ellingson Lumber Company, acquired much of its products from points in California, as well as

Oregon, and it was thereafter transported in many instances over the rail lines of defendants, Western Pacific and/or Great Northern to plaintiff and its assignee's mills in the Klamath Falls area, where it was manufactured into lumber. Thereafter, the finished products were again transported in many instances by defendants, Western Pacific and/or Great Northern to customers in many instances in other parts of the United States. The production, manufacture, fabrication, delivery and sales to ultimate consumers under such circumstances are and were in the stream of interstate commerce and serve as mere conduits for the eventual delivery and sale of such products to consumers. Delivery of products by plaintiff to defendants in such fashion was reasonably continuous, and it was intended and recognized that such lumber and timber products would eventually be resold to customers, brokers, wholesalers and the like in many states besides those in the Pacific Northwest. Such procurement and sale of timber and lumber products directly affect the total volume of such products shipped into and without the State of Oregon and California, and affect, alter and modify the total volumes shipped and delivered in interstate commerce.

VI.

Assignment

Prior to the institution of this action, for value received, plaintiff's assignee, Ellingson Lumber Co., assigned its cause of action against defendants to plaintiff herein. Ellingson Lumber Co. is a copartnership, operated by members of the same family who operate Ellingson Timber Company, composed of R. P. Ellingson, M. T. N. Ellingson, Robert P. Ellingson, Jr., Donald M. Ellingson, Sigmund H. Ellingson, and Dorothea B. Balderson. Ellingson Lumber Co., also engaged in the general lumber business in the vicinity of Klamath Falls, Oregon, and other locations.

VII.

Co-Conspirators

Whenever the term "Co-Conspirator" or "Co-Conspirators" is used in this Complaint, it shall refer to the following corporation, partnership and individuals unless otherwise stated:

Chiloquin Timber Company, Inc., a Washington corporation;

Klamath Basin Pine Mills Co., a copartnership composed of A. N. Beals, King Gray, Wilbur L. Kesterson;

M. A. Wyman, M. H. Wyman, D. E. Wyman and W. I. Kesterson.

VIII.

Conspiracy To Monopolize and Restrain

Within a period less than four years prior to filing this complaint, and commencing prior thereto, but continuing thereafter, defendants, Great Northern Railway Company and Western Pacific Railway Company, and the co-conspirators named herein, together with other persons, partnerships, corporations and companies unknown to plaintiff, have acted concertedly together through agreement, understanding and control, and in certain cases tacitly, and pursuant thereto have mutually adopted and conducted their businesses in accordance with common plans and programs, which defendants and some or each or all co-conspirators have adopted in order to accomplish the following purposes and objectives, among others:

(a) Control, eliminate, restrain and regulate the degree of competition and to restrain trade in the lumber and timber industry;

(b) Monopolize, control and channelize distribution of lumber and timber products;

(c) To arbitrarily, unlawfully, unreasonably and knowingly raise, fix, control, set, stabilize and effect the price of timber and lumber products purchased and shipped in interstate commerce within the United States;

(d) To arbitrarily, unlawfully, unreasonably and knowingly prevent, suppress and eliminate competition with other potential and actual competitors in the sale and procurement of lumber and timber products; and

(e) To establish and maintain unreasonably high, excessive, monopolistic and noncompetitive prices for lumber and timber products and thus deprive purchasers and consumers of the benefits of free and open competition.

IX.

Activities in Furtherance of Such Plans

To further the objective of said conspiracy, defendants, Great Northern and Western Pacific and other co-conspirators, among other activities, have:

(a) Systematically attempted to preclude plaintiff and plaintiff's assignor, from operating lumber mills in the vicinity of Klamath Falls, Oregon, and from obtaining the requisite supply of logs and timber in order to operate such mills;

(b) Prevented and restrained plaintiff and plaintiff's assignor from marketing their products except in certain designated and prescribed areas;

(c) Held back large sums of money for extended periods of time, which greatly inhibited and prevented plaintiff and plaintiff's assignor, from competing on an equal basis;

(d) Fixed rates arbitrarily and unfairly against plaintiff and plaintiff's assignor, which made it difficult to compete; and charging and establishing unfair

disproportionate rates to plaintiff and plaintiff's assignor;

(e) Refusing to extend the same facilities on an equal basis to plaintiff and plaintiff's assignor, which are extended to its business rival or rivals; and

(f) Forcing plaintiff and plaintiff's assignor to abandon many facilities, because of the economic pressure exerted by the actions described above.

X.

Effect of the Restraints

The effect of the aforesaid restraints and attempts to monopolize has been to restrain trade and commerce among the several states, and constitutes an attempt to monopolize a part of the trade or commerce among the several states, in violation of the Sherman Act (15 U.S.C. #1 and 2) and subsequent amendments.

XI.

Result of Defendants' Unlawful Acts

As a direct result of defendants' actions, plaintiff and plaintiff's assignor businesses have been greatly hampered, have been precluded from their normal growth, have been restricted from obtaining supplies and raw materials, have lost the interest on the money which was withheld, have been required to operate with impaired capital, have been obliged to abandon facilities, have sustained losses in the value of property and equipment and have been obliged to sell property and equipment at depressed prices, all to their damage in the sum of $3,875,000.

XII.

Treble Damages

Plaintiff and plaintiff's assignor have been damaged in their business and property by reason of the unlawful

conduct and acts of the defendants, and under the provisions of an Act of Congress of the United States, approved October 15, 1914, 38 Stat. 731 (U.S.C. Title 15, #15), plaintiff is entitled to recovery in the amount of threefold damages sustained by plaintiff and plaintiff's assignor and the costs of this action and for reasonable attorneys' fees incurred herein.

WHEREFORE, plaintiff requests compensation for damage sustained by itself and by its assignor in the sum of $3,875,000, which sum should be trebled in the manner provided by law, and for its reasonable attorneys' fees, and for its costs and disbursements incurred herein.

/s/ Roger Tilbury
Attorneys for Plaintiff

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Portland, Oregon 97204

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Wilcox Building
Portland, Oregon 97204

Plaintiff respectfully requests a trial by Jury.

APPENDIX C

Transcript of Proceedings October 16, 1967

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 67-316.

ELLINGSON TIMBER COMPANY, *Plaintiff*,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation, and WESTERN PACIFIC RAILROAD COMPANY, *Defendants*.

Portland, Oregon

October 16, 1967

TRANSCRIPT OF PROCEEDINGS

BEFORE: The Honorable Gus J. Solomon, Chief Judge.

[Tr. 1] The Court: We will take up the Ellingson Timber Company case. How many interrogatories have you objected to?

Mr. Cory: I think about 56, your Honor, or 57. I have answered six of them that I thought related to jurisdiction.

The Court: Have you tried to get together with him and see which ones you could agree on?

Mr. Cory: Well, I think that all the rest of these, your Honor, relate to a great mass of very very intricate facts. With respect to some of them, they relate to the 10-year periods—7-year periods at the limit. But, of course, my point was, your Honor, in making the objection, unless we knew whether this Court had jurisdiction over the subject matter, it would be most harassing to require the defendant to answer the very very intricate long interrogatories. I think it is vexation anyway. It would take literally months to file accurate answers, I am afraid.

The Court: Mr. Tilbury, I have looked at some of these; I just cannot see the relevancy of some of them. For example, look at (12) (a) "In what locations in the Pacific Northwest does defendant share trackage with other carriers? (b) With which other carriers are they shared (in each instance)?"

How is that going to prove or disprove any issue with respect to the two issues before the Court?

[Tr. 2] Mr. Tilbury: Your Honor, I will try to be brief. The contention of the defendant, as I understand it, is this is a segregated issue, and because the Interstate Commerce Commission made a decision under the Interstate Commerce Act in 1960, as a result of this complaint that was lodged in 1958, therefore, the Interstate Commerce Commission controls everything irrespective of anything outside of that decision that may have occurred at a subsequent time. We are not trying to attack the Interstate Commerce Commission's decision. We are saying there were acts starting in 1963, which were in clear-cut violation of the Sherman Act. At that time, they attempted and eventually succeeded in forcing our client out of business.

The Court: That is not what I submitted on the segregated issue. I segregated the issue of whether the statute of limitation had run. I also segregated for trial the issue of whether an action may lie in antitrust in an industry regulated by the Interstate Commerce Commission. Those were the only two issues. How are any of the questions you asked applicable to those issues?

Mr. Tilbury: Well, I understood that the issue was whether the decision by the Interstate Commerce Commission in 1960 controlled and precluded us from bringing an action before this Court arising out of the Antitrust for an action that occurred subsequent to that time. This, I thought, was [Tr. 3] the issue your Honor separated and not the other issues, because the issue that you present could be answered quite easily; I concede that. But, if we are limited to that single issue, of course, I would concede

we are in somewhat of a different posture than we otherwise would be.

The Court: Mr. Cory, is that what I held? This has been a couple of months ago.

Mr. Cory: Well if your Honor please, the question, I think, was brought up by Mr. Cosgrave. I thought there was a very serious issue as to whether this Court has jurisdiction over the subject matter. Now, it does go to the proceedings before the Interstate Commerce Commission that started in 1957 and were concluded in 1960.

The plaintiff's deposition was taken, which lasted for a full day. It's on file in this case. This will be part of our record on the segregated pretrial. The plaintiff's deposition clearly shows that every complaint—every so-called antitrust complaint that he makes in this case are the same Interstate Commerce Commission Act violation which he complained of to the Interstate Commerce and tried to recover $200,000.

The Court: You are not answering the question. I want to know from you the issue that you think is before me. I thought you said the principal issue would be the statute of limitation and the question of the Court's jurisdiction over [Tr. 4] a regulated industry. Is that true or not?

Mr. Cory: Well, the Court's jurisdiction over a regulated industry is not a question of law in a vacuum. It is—it has to be looked at in the contention of the particular complaint for treble damages. You can't sue an interstate carrier if he tries to drive you out of business and coerces you into conspiracy with another interstate carrier. That could be conceded. But, here, every complaint, these log rates and this holdback—these holdbacks of $30 a car and this preference and these discriminatory practices that he has tried to recover treble damage on, these acts were the acts that were decided by the Interstate Commerce Commission to be lawful and nondiscriminatory.

The Court: What is your point?

Mr. Cory: Well, my point is that that can be determined, I believe on a segregated pretrial which we have done a lot

of work on, incidentally. We have presented our draft of pretrial order to Mr. Tilbury. He has come back with some suggestions for changes with his own contentions. Perhaps, it would be clearer to your Honor if you read this first draft or look at the first draft of the pretrial order.

The Court: First I would like to find out what the issue is. I don't have to determine at this posture of the case whether this evidence is admissible. I just have to [Tr. 5] find out whether this information may lead to relevant testimony.

Mr. Cory: We are looking at this preliminary issue of jurisdiction over the subject matter, I believe. These preliminary issues that the Court segregated for separate trial, and I might say, we have just started off and have done a lot of work on the first issue of jurisdiction over the subject matter. We have done no work on this second issue of statute of limitation. I don't know if that could be disposed of also. But, we believe we have gotten down to working on that matter. I think it would be best for the Court and for the parties, in the meantime, to limit the first pretrial order to the question of the Court's jurisdiction over the subject matter that we are working with here.

But, I would say on the objections to interrogatories, none of these objections to interrogatories turned on the jurisdiction of the Court over the subject matter.

The Court: I cannot go behind the decision of the Interstate Commerce Commission to say that decision was incorrect, can I?

Mr. Cory: Mr. Tilbury would concede that.

Mr. Tilbury: We concede that.

Mr. Cory: That, in effect, is res judicata. We are not trying anything that has been tried before the ICC. We [Tr. 6] say plaintiff's deposition—Mr. Ellingson's deposition, which lasted all day and was 150 pages, shows everything that Mr. Ellingson and his cost complaint of this treble damage proceedings were adjudicated; all these charges were adjudicated to be lawful and nondiscriminatory in the Interstate Commerce proceedings. Under the Keogh case, we rely on Justice Brandeis' decision in *Keogh*

v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156. That shows a situation where a treble-action suit was filed in which the plaintiff tried to say the alleged damages resulted from a combination to fix rates in restraint of interstate commerce. The Court said if a shipper could recover under Section 7 of the Antitrust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might operate to give him a preference over his trade competitors. In other words, it would be discriminatory and preferential in favor of the plaintiff, because he can get treble damages whereas nobody else could. They are limited by the Interstate Commerce Act.

The Court: Let me hear from Mr. Cosgrave.

Mr. Cosgrave: Your Honor, as I stated, I am not directly involved in this phase. But, I am involved in the segregation of issues. Your Honor asked what it was that you had segregated. I think I could say that your Honor said [Tr. 7] to Mr. Tilbury at the time this first came up: Can you bring a Sherman case against a regulated industry? We say, no, he cannot. He cannot for a number of reasons. We say we felt there was a question of jurisdiction of the Court over the subject matter that arose, because it is a regulated industry. The Interstate Commerce Act permits it to arrive at charges and freight rates which might otherwise be subject to examination under the Sherman Act, but which are not.

Your Honor referred to the ICC proceedings that occurred before. We think that provides another reason why this Court does not have jurisdiction over the subject matter.

Now, on those issues——

The Court: To what proceeding are you referring?

Mr. Cosgrave: Pardon me, sir?

The Court: You were talking about the proceedings before the ICC.

Mr. Cosgrave: The proceedings before the ICC, we say, on the basis of Mr. Ellingson's deposition, which has been

taken, embodied and presented to the Commission, the exact complaint that he makes here about these two rates were made.

The Court: Why can't Mr. Tilbury ask about those proceedings before the ICC in his interrogatories?

Mr. Cosgrave: Your Honor, in the first place, all of this was before the Interstate Commerce Commission. All [Tr. 8] these issues were determined and decided by the Interstate Commerce Commission. Now, they say they have a cause of action that is based on what occurred in the last four years.

To give your Honor an example of what their position will be, in a draft of his contentions, Mr. Tilbury says under No. 3:

"The decision of the Interstate Commerce Commission could, under no circumstances, be determinative of the issues presented in this case, which relates to a different period of time, to different legal issues, and which presents additional facts."

We say that although he says that in this piece of paper, we have taken Mr. Ellingson's deposition and we have looked at his complaint, and, it's all the things that were involved in that prior proceedings which has been determined and was subject to determination by the ICC.

The Court: I have been looking at these interrogatories. I cannot understand how an interrogatory which says, what do you mean by a mixed car and various other things like that, have any relevancy to any of the issues involved in this case.

Mr. Tilbury: Your Honor, may I respond briefly?

The Court: Yes.

Mr. Tilbury: First, I would like to dispose of a [Tr. 9] number of statements that have been made, if I might.

We are not trying to retry the issues before the Interstate Commerce Commission. Whatever was tried and decided by the Interstate Commerce Commission, we would accept those things. We are saying this, your Honor: We

have never been allowed discovery at the Interstate Commission or up to now in this case. They are attempting to say: "Mr. Ellingson, you are limited absolutely to everything you knew at the time that you testified in our office under deposition." We feel certainly that we are entitled to find out the facts in the possession of the defendants. Now, this is what they are objecting to.

The Court: Mr. Tilbury, the reason why you have so much difficulty is you don't make yourself clear. You never set out clearly and succinctly what you are trying to do. You are always outside the record.

Mr. Tilbury: All right, your Honor, that's my fault. Please don't hold it against my client.

The Court: If you would set out clearly and succinctly precisely what you need, then a court would be able to do something for you. But here you put in 61 interrogatories and many of them have no relevancy at all to any of the issues in the case.

Mr. Tilbury: Your Honor, in order to answer the question: Was my client discriminated against, you have to [Tr. 10] know whether he was charged a different rate than somebody else. It's necessary to consider at least these factors. For example, you have to first know——

The Court: Do you know those factors?

Mr. Tilbury: No, sir, they have the information.

The Court: How could you bring an action for antitrust violation when you did not know the facts?

Mr. Tilbury: Your Honor, most of these facts are within their knowledge.

The Court: You mean you are just bringing this action on suspicion and surmise; is that what you are telling me?

Mr. Tilbury: No, sir. I am asking in good faith, and so is my client. We don't have personal knowledge of this. We don't have all the facts that are available to the defendants. Unfortunately, they have the information. In most cases, they know what agreements they made; they know how they classified these things. I am asking, for example, for information dealing with their tariff structure in order to know

the answers to the questions asked in No. 14. This is a very intricate case. Now your Honor feels I am not being briefed enough. I wish I could be more brief.

Your Honor, it would be simple if I could ask them directly. It is necessary to make a comparison of all these factors in order to arrive at the final result. And, it's [Tr. 11] in the nature of the antitrust cases to be somewhat complicated. It would be very easy if we were trying a personal injury case, and I could make four requests. Unfortunately, this is not the nature of this case.

I have a brief that I have tendered, your Honor, dealing with the scope of the interrogatories.

The Court: I will take a look at your brief and then make a determination.

Mr. Cory: I would like to make one point. Mr. Tilbury says this would require looking at these factors to determine whether a particular rate charged to his client was discriminatory or nondiscriminatory. That is the very rate that has been determined by the Interstate Commerce Commission to be lawful and not discriminatory and not preferential.

Mr. Tilbury: In the first place, that is the rate, in 1960, that was presented to the Interstate Commerce Commission. As a matter of fact, that did not exonerate the railroad insofar as the cutback rates on logs to outbound lumber shipments. So, it isn't the simple issue that my opponent would present.

Mr. Cosgrave: The last matter on the cutback, that was conceded by the defendants in that proceeding.

Your Honor, when we first stood up here earlier and you had us to wait, I think you put your finger on it when you said to Mr. Tilbury: "What are you claiming in this [Tr. 12] case?" That is what the defendants would like to know in connection with this pretrial that we are working on. What do they claim that these defendants did in the last four years. Of course, that would relate to these interrogatories. It isn't sufficient to say it involves different periods of time and different legal issues.

The Court: Perhaps Mr. Tilbury could do that right now. What are you claiming in this case?

Mr. Tilbury: We are claiming, your Honor, there was a violation——

The Court: I don't want this gobbledygook. Tell me specifically what they did that they should not have done.

Mr. Tilbury: All right. Specifically, your Honor, eliminating a lot of other material, we are saying: Number one, they attempted to restrict our business and preclude us from making a go in the industry.

The Court: How?

Mr. Tilbury: They charged us such a prohibitive rate, it was impossible for us to economically ship our products to California.

The Court: Your number one is that they charged you a great deal more than they did comparable shippers.

Mr. Tilbury: Yes, sir. This is continuous.

The Court: This was for the purpose of driving you out of business with a rate higher than those charged to [Tr. 13] comparable shippers.

Mr. Tilbury: Yes, sir.

The Court: What is your next one?

Mr. Tilbury: There was a systematic attempt to get us out of business by the fact they made it economically unprofitable.

The Court: Tell me how they did it in plain simple English.

Mr. Tilbury: All right. Among other things, they imposed a $30 a car penalty charge on us for each car unless we agreed to ship all of our products east into the transcontinental tariff areas which would be east of Denver. This is one thing, among many other factors.

The Court: Tell me the other factors.

Mr. Tilbury: Many of these, your Honor, without going into all details, we would like to find out from the opposition—at this time they are denying our right to discover these factors. They know for example, what they have charged to other shippers. We know what we were charged.

But, we cannot look behind their records to find out how they treated others of our competitors. There are other lumber companies in Southern Oregon, and at least one of which we believe the railroad has a substantial interest. We believe they probably gave that other lumber company, among other things, tax breaks and many other advantages not [Tr. 14] extended to Mr. Ellingson and his lumber company. But these are things, your Honor, which require evaluation of many factors. I am sorry I haven't made it as clear apparently as I should.

I have, by the way, the transcript that was presented. Your Honor, I tried to follow your language. This was in July—August, rather. You indicated at that time: We are going to have a trial on the statute of limitation. We will have a trial on the issue of whether these acts were within the jurisdiction of the Interstate Commerce Commission. We will have a number of these other issues which we can try in advance of the main case.

I interpreted that to mean—perhaps I am not interpreting it correctly; but this requires an understanding primarily on what has taken place in the past and the fact it was limited to a particular period. There were particular charges made. We are saying there are other things that have happened.

The Court: What other things?

Mr. Tilbury: I have mentioned some of these things, your Honor. We feel there was a system on the part of the railroad to drive us out of business by the application of the excessive tax rate plus the privileges extended to our competitors and not extended to us such as various railroad facilities, dumping privileges, profit sharing agreements and [Tr. 15] a number of other factors which we think will come to light if your Honor allows us to proceed with the interrogatories.

The Court: Why don't you take these interrogatories back and file new interrogatories in clear understandable and succinctly language. Set out exactly what you want in not more than 15 interrogatories in the first instance. Then

if these are relevant, you can subsequently apply for more and I will give them to you.

Mr. Tilbury: All right.

The Court: I want to know what you are trying to do.

Mr. Tilbury: All right.

The Court: If I find that you have asked for relevant information and that you need more information, I will give you an additional 15 interrogatories.

I think you had better analyze your problem. I will give you two weeks within which to do it.

Mr. Cosgrave: I made a list here of what Mr. Tilbury says he is claiming. One is the prohibitive rate which was higher to them than other shippers. That, we assume, is the rate that was involved in the other proceeding. Then he says the $30 cutback. That was involved in that proceeding also. Then, the tax rate to other mills, that doesn't involve the defendant Western Pacific Railroad. It just seems to me we could narrow this further discovery down, your Honor, by having him say: This is what I claim you did [Tr. 16] within the last four years which is the relevant period that is involved. I guess that is what he is saying we did. Maybe we can go on and try to work out the pretrial order and the interrogatories.

Mr. Tilbury: Yes.

The Court: Mr. Tilbury, is much of this information which you are seeking in the transcript of the testimony before the Interstate Commerce Commission?

Mr. Tilbury: No, sir; unfortunately, it deals with the lease of one of the lumber companies. Then they recessed. We still do not know what is contained in the lease.

The Court: What did the Interstate Commerce Commission do after Mr. Ellingson testified?

Mr. Tilbury: Well, they held one of the actions of the railroad to be legal; they held another action of the railroad to be illegal. Specifically, they found that the cutback they charged us of $30 more per car, they said you could get the $30 back in the event that Mr. Ellingson were to ship all of his products east of Denver.

The Court: You mean the Interstate Commerce found that restriction to be illegal?

Mr. Tilbury: Yes.

The Court: Then, you are in pretty good shape. Why do you need any more information from them on that?

Mr. Tilbury: Your Honor, we do not feel it stops at [Tr. 17] that point. Mr. Ellingson was compelled to sell his entire mill in 1963 as a result of a number of actions on the part of the defendants. We would like to know precisely all of the factors that brought this about.

The Court: You file your 15 interrogatories; then I will take a look at them.

Mr. Tilbury: All right, your Honor.

APPENDIX D

Transcript of Proceedings January 2, 1968

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 67-316

ELLINGSON TIMBER COMPANY, *Plaintiff*,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation, and WESTERN PACIFIC RAILROAD COMPANY, *Defendants*.

Portland, Oregon

TRANSCRIPT OF PROCEEDING

BEFORE: The Honorable Gus J. Solomon, Chief Judge.

[Tr. 1] The Court: What portions of the proposed pretrial order do you object?

Mr. Cory: Your Honor, we just have a few small changes. Of course, in that pretrial order that Mr. Tilbury sent through inadverteney, did not have all the parts in there.

Mr. Cosgrave: See, this is the pretrial order, your Honor, we have worked out.

The Court: The pretrial order with respect to Court's jurisdiction over the subject matter.

Mr. Cory: Yes. We want to add and the statute of limitation.

The Court: In the title?

Mr. Cory: In the title.

The Court: I will add it. Have you got a contention on the statute of limitation in the pretrial order?

Mr. Cory: Yes, we have a contention on that.

The Court: Which one is that?

Mr. Cory: Just starting from the top over on page three, paragraph four, we would suggest where it says: "Acquired much of their log supply from points in California as well as Oregon. . ." we would like to say, "In California and Oregon."

The Court: Where are you?

Mr. Cory: Well——

Mr. Cosgrave: Mr. Cory, I think it would be easier for [Tr. 2] the Court if we would hand up a copy which has these corrections in it. We have worked on that, your Honor. This is a copy that has the small changes in them.

Mr. Cory: It's on this draft, page three at line 13 and 14 and 27 of that page. They are just some small changes. I don't think Mr. Tilbury objects to them.

Mr. Tilbury: I don't.

The Court: Have you given a copy to Mr. Tilbury?

Mr. Cory: I just gave it to him.

Mr. Tilbury: Just this moment.

The Court: Is there any objection to those small changes that he is suggesting?

Mr. Tilbury: No, sir.

The Court: How about page four?

Mr. Cory: I think page four is all right, your Honor. Page five is okay. Page six of our draft is all right. Page seven is all right down through paragraph 15. Seven through 15 is okay.

Mr. Tilbury proposes additional paragraphs 16, 17 and 18. We don't think we can agree to what he proposes on 16 and 18.

The Court: You want to object to paragraphs 16 and 18?

Mr. Cory: Yes.

The Court: We will delete that and put 17 in the place of 16. Then, you can put 16 and 18 in as your contentions. [Tr. 3] However, that is a fact you can prove at the trial.

Mr. Cory: Then, we did propose a couple of additional short paragraphs on the next page of the draft. I don't think Mr. Tilbury has seen these before. Number 17 on that page would be a duplicate. That would come out.

Mr. Cosgrave: I think I gave you a copy of that before, Roger.

Mr. Cory: It would just be a question of paragraphs 15 and 16 which would be renumbered if they went in.

The Court: Is there any portion of 16 or 18 that you consent to?

Mr. Cosgrave: Well, the first sentence of No. 16, your Honor, is almost the same as our proposed 18. That is one of the reasons we thought that could go in the contentions.

The Court: What do you want to add on your agreed facts?

Mr. Cosgrave: Just those two short ones, your Honor, that are on the half page—short page that follows.

The Court: I have a long distance call from Washington, D.C. We will take a short recess.

(Whereupon a short recess took place, after which the following proceedings occurred:)

The Court: What did you decide in my absence?

Mr. Cory: Well, we have talked about redrafting a [Tr. 4] couple of these later paragraphs. I don't think we will actually reach any agreement.

Mr. Cosgrave: I don't think there will be any problem, Judge. We can redraft those two pages. In other words, the proposed additional agreed facts—the two pages that are entitled Proposed Additional Agreed Facts, I would think we could arrive at something.

The Court: All right. How long will it take you to try this case?

Mr. Tilbury: I don't think it would take very long on the segregated issues.

Mr. Cosgrave: On these issues, it shouldn't take long.

Mr. Tilbury: I am going to reopen an old wound. I have talked to my client and he tells me he thinks there are only five or six interrogatories that would be in this category.

The Court: You can file a supplemental list of interrogatories.

Mr. Tilbury: All right.

The Court: Just ask for what you actually need and give it to counsel and see whether they will be in a position to give you the information. If you don't get the information you need, you can take it up with me.

Mr. Tilbury: The only thing I was concerned about is the fact there may be something I am not aware of. That's [Tr. 5] what I am a little concerned about.

The Court: It is very difficult to file a case and try it on suspicion.

Mr. Tilbury: Yes.

The Court: I think when you file a case, you should have some basis for filing it.

Mr. Tilbury: I certainly agree with that.

The Court: I am going to try to get an outside judge to try the case. But on the question of the statute of limitation and the jurisdiction, when will you be ready to try that?

Mr. Tilbury: I am writing a brief for the United States Supreme Court which I think will be finished in about two weeks, your Honor.

The Court: Do you want to try it in March?

Mr. Tilbury: That will be fine, your Honor.

Mr. Cory: The early part will be fine.

Mr. Cosgrave: That will be fine.

The Court: Are you leaving town?

Mr. Cory: No. Sometimes we have a little vacation about the end of March or early April. The week of March 4th is all right.

Mr. Cosgrave: Your Honor asked about how long it would take. I may have said a half day. If I did, I was referring to the segregated issues.

[Tr. 6] The Court: I know that. There are not very many facts, are there? It is primarily a question of law?

Mr. Tilbury: Yes.

Mr. Cosgrave: Yes.

Mr. Tilbury: The facts could be presented in a few hours probably.

The Court: It will be the week of March 4th.

Mr. Tilbury: I probably should say, your Honor, Judge Belloni is an old acquaintance of Mr. Ellingson. I did not know whether counsel would object.

The Court: Is there very much of a factual problem?

Mr. Tilbury: No.

Mr. Cosgrave: No, I think not. Our position would be that it can be determined as a matter of law. There may be a few minor issues.

The Court: Maybe I can have someone from Seattle come down or maybe I can take this particular part myself.

I am going to set it down for another hearing on the 29th of January. At that time you can submit your pretrial order.

Mr. Cosgrave: At 9:30, your Honor?

The Court: 9:30. If there are other problems, I will hear them at that time. Cut down your requests and give them to counsel and see if they can get together.

* * *

APPENDIX E

Transcript of Proceedings March 4, 1968

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Civil No. 67-316

ELLINGSON TIMBER COMPANY, *Plaintiff*;

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation, and WESTERN PACIFIC RAILROAD COMPANY, *Defendants*.

Portland, Oregon

TRANSCRIPT OF PROCEEDINGS

March 4, 1968

BEFORE: The Honorable Gus J. Solomon, Chief Judge.

[Tr. 1] The Court: Mr. Cosgrave gave me a copy of a brief which I don't have. I know you gave it to me. You didn't take it back, did you?

Mr. Cosgrave: No, sir, I didn't, your Honor.

The Court: All right.

Mr. Cosgrave: I have here a short reply, your Honor, that I hand to counsel.

Mr. Tilbury: I don't want to be left out. I have one too.

The Court: Cleve Cory, you mean you want to be left out?

Mr. Cory: I filed my memorandum Friday, your Honor.

The Court: You don't have any rebuttal or answers?

Mr. Cory: No. I have said my piece.

The Court: I think it is the Defendants who have to go forward, don't you? This is on the issue of the statute of limitation; isn't it?

Mr. Cory: Yes. And, the Court's jurisdiction over the subject matter of the action, your Honor.

The Court: If it is a question of the jurisdiction, I think the Plaintiff goes first. Are you to go first, Mr. Tilbury?

Mr. Tilbury: Whichever way your Honor wishes.

The Court: Go ahead.

[Tr. 2] Mr. Buehner: At this time, your Honor, as we indicated when we were up here Friday, I believe it was, that we would have a few short questions for Mr. Ellingson. We would like to put him on the stand at this time.

The Court: This is the time to put him on. I am not going to decide the case today, because I have not read the briefs. You can just make your record today. Then I am going to take some time to consider the testimony and the exhibits in light of the law.

Before Mr. Ellingson testifies, I think it might be well to make your record on the exhibits. Do you have exhibits?

Mr. Buehner: Yes, your Honor.

The Court: Why don't you offer all your exhibits now.

Mr. Buehner: I think Mrs. Spargo has them all. At this time I think we just might as well—we have no objection to none of their exhibits. And, I assume——

The Court: In the first place, does the Plaintiff offer all its exhibits?

Mr. Buehner: Yes, your Honor.

Mr. Cory: I have no objection, sir.

Mr. Cosgrave: No objection.

The Court: All plaintiff's exhibits are admitted.

Mr. Buehner: Thank you.

The Court: How about the Defendants' exhibits?

[Tr. 3] Mr. Buehner: We have no objection.

The Court: The Plaintiff has no objection to the Defendants' exhibits. All exhibits listed in the pretrial order are admitted.

(Whereupon Plaintiff's Exhibits 1, Photographs of spur track and equipment at Jellico, California; 2, Answer of Great Northwestern Railway Company in

ICC proceeding (No. 32489); 3, Answer of Western Pacific RR Co. in ICC proceeding (No. 32489); 4, Letter from Paul E. Neff to Roger Tilbury dated January 17, 1968; 5, Letter from Cleveland C. Cory to Roger Tilbury dated January 11, 1968; 6, Great Northern Railway Co. Memorandum relating to sale of Klamath Basin Pine Mills dated September, 1961; 7, Letter from Assistant to Comptroller, Glacier Park Co., to Chief Engineer, dated September 28, 1961; 8, Letter from Clark Eckart to J. C. Kenady dated December 6, 1960; 9, Letter from Clark Eckart to J. M. Budd, dated December 23, 1960; 10, Memorandum of Approval from Great Northern Railway Co. entitled "Sale of Klamath Falls Sawmill to the DiGiorgio Fruit Corporation", dated October 20, 1961; 11, Letter from C. E. Finley to J. M. Budd [Tr. 4] dated January 26, 1960; 12, Contract of sale between Great Northern Railway Company, Glacier Park Co. and DiGiorgio Fruit Corporation for sale of Klamath Basin Pine Mills Co. site dated September 14, 1961; 13, Letter from L. L. Shaw to Mr. Eckart dated June 15, 1960; 14, Letter from Mr. Shippey of DiGiorgio Fruit Corporation to Great Northern Railway Co. and Glacier Park Co. dated January 8, 1963; 15, Memorandum prepared for the Board of Directors of Great Northern Railway Co. dated October 20, 1961; 16, Map of Boy Scout Mill site, Klamath Falls; 17, Photo of equipment located on property of Boy Scout site, were received as Plaintiff's exhibits.

Defendants' Exhibits 31, Deposition of Robert P. Ellingson, Jr.; 32, Complaint filed by Plaintiff and its assignor before ICC on June 26, 1958 (Docket No. 32489); 33, Transcript of Proceedings (3 volumes) before Hearing Examiner of the ICC (January 28, 1959-January 30, 1959); 34, Brief of Complainants dated March 25, 1959 and filed with ICC (Docket No. 32489); 35, Report and order of ICC (April 29, 1960) in Docket

No. 32489; 36, Supplemental No. 54 to [Tr. 5] Pacific South Coast Freight Bureau, Tariff 48-U ICC #1553 effective June 6, 1956; 37, Supplemental No. 76 to Pacific South Coast Freight Bureau, Tariff 48-U ICC #1553, effective August 9, 1957; 38, Complaint filed on March 2, 1964, by Plaintiff and its assignor in Circuit Court, Multnomah County, (No. 299-005); 39, Transcript of testimony of Robert P. Ellingson, Jr. in said action (No. 299-005); 40, Letter from R. P. Ellingson, Jr., to John Budd, President of Great Northern Railway Company, dated November 22, 1961; 41, Letter from John Budd to R. P. Ellingson, Jr. dated December 1, 1961; 42, Letter from R. P. Ellingson, Jr., to J. M. Budd, dated December 5, 1961; 43, Letter from R. P. Ellingson, Jr., to Frank Steele, dated July 26, 1961; 44, Letter from F. W. Steele to R. P. Ellingson, Jr., dated August 2, 1961; 45, Letter from R. P. Ellingson, Jr. to Frank W. Steele, dated August 8, 1961 and 46, Letter from F. W. Steele to R. P. Ellingson, Jr., dated August 11, 1961, were received in evidence.)

Mr. Buehner: I think the Court's attention should be called, Mr. Cosgrave, to the fact you have offered three [Tr. 6] or four letters which were not originally in the pre-trial order.

Mr. Cosgrave: Oh, yes, they were listed by the Clerk.

The Court: They were 43, 44, 45 and 46.

Mr. Cosgrave: Yes. Thank you.

Mr. Buehner: Call Mr. Ellingson.

[Tr. 7] R. P. Ellingson, Jr. was thereupon produced as a witness in behalf of the Plaintiff, and having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

The Clerk: Will you state your full name and address, sir.

The Witness: Robert P. Ellingson, Jr.; 1700 Fairmont Street, Klamath Falls, Oregon.

The Clerk: Be seated, please.

Mr. Buehner: If the Court please, in order to shorten this all, all the exhibits including 31, which is the deposition of Mr. Ellingson, which goes into his background, is received in evidence.

The Court: All right. You don't have to go into that. Is Exhibit 31 admitted for all purposes?

Mr. Buehner: That's right.

DIRECT EXAMINATION

By Mr. Buehner:

Q. Mr. Ellingson, you are acquainted generally with the exhibits in this case? A. Yes, generally.

Q. Would you describe what is meant by the Pacific Territory defined in the exhibits in this case? A. The Pacific Territory is divided into the north coast section and the south coast section. Most of this is covered [Tr. 8] by the south coast section. And, it's differentiated between the east of the Rocky Mountains and the west of the Rocky Mountains. The Pacific Coast covers California and Oregon and part of Arizona for my business.

Q. I see. Now, what effect did this hold-back arrangement have with respect to your marketing activities in the lumber business when you were operating?

Mr. Cosgrave: As a matter of record, your Honor, I think I should record an objection at this time to any such testimony unless it relates to matters within the last four-year period prescribed by the Statute of Limitation. I assume the Court will hear it.

The Court: I will note your objection.

Mr. Cory: I would object also.

The Court: I will note your objection and admit it provisionally.

Mr. Cosgrave, tell me what they have sued for and why you have raised the jurisdictional point.

Mr. Cosgrave: Your Honor, this matter began with the filing of this case in a proceeding before the Interstate Commerce Commission which resulted in the decision of the

Interstate Commerce Commission in 1960. That involved a challenge by Ellingson of the rates and what was called a hold back or cut back provision with respect to the tariff. That was decided in 1960, by the Interstate [Tr. 9] Commerce Commission.

Then, later——

The Court: Was that in his favor or against him?

Mr. Cosgrave: It was against him, your Honor.

The Court: All right.

Mr. Cosgrave: With respect to this one point, that cutback method of computing—or assessing rates, which had been in the original tariff, restricted to points other than mountain-pacific territory, which was found unjust and unreasonable. But, that was so found without objection by the Defendants. The Defendants had no objection to that phase of the decision, your Honor.

The Court: All right.

Mr. Cosgrave: It is our position—it is my position, as far as the Defendant Western Pacific is concerned, your Honor, that there is nothing charged against Western Pacific in this case at the present time except the matter of those rates which were established by Pacific South Coast Freight Bureau of which Western Pacific was a member, which was then challenged by Ellingson in the ICC proceeding. And, the rates were found to be not unjust or unreasonable. And, it is our position there is nothing else as far as we are concerned since that time.

The Court: That happened in 1960?

Mr. Cosgrave: Yes, sir.

[Tr. 10] The Court: What about Great Northern, do you join with Western Pacific?

Mr. Cory: We join with them. There are certain other acts alleged against the Great Northern in connection with its sales of Klamath Basin Pine Mill to DiGiorgio Fruit Company, which sale was consummated to the knowledge of Mr. Ellingson in the fall of 1961. And, the claims, besides these freight claims against both defendants, the claim was made that this sale, in some way, monopolized commerce

or prevented Mr. Ellingson, as a competitor from operating his mill; and that it was in violation of the antitrust law.

The Court: Are you through?

Mr. Cory: Yes.

The Court: I am going to overrule the objection and permit the evidence to come in provisionally. Then, I am going to decide at a later time whether I can consider this testimony.

Mr. Tilbury: Your Honor, may I say a word or two about this?

The Court: Yes.

Mr. Tilbury: We accept whatever the Interstate Commerce Commission did in 1960. Whatever their decision was stands, as far as we are concerned. We are not attempting to collaterally attack it. We feel most of this argument is completely irrelevant. What we are charging [Tr. 11] here is a conspiracy to monopolize and drive us out of business. This was consummated in 1963; not in 1960. This issue was not considered by the Interstate Commerce Commission. And, there are many other aspects of this case besides those issues that were considered by the Interstate Commerce Commission. As a matter of fact, there are many facts which have come to our knowledge within very recent times, that, of course, were not available to us in 1960.

I'd like to make it clear; perhaps it already is. But, the thing that we are—one of the aspects of our attack in this case relates to the fact that the Interstate Commerce Commission did find, as Mr. Cosgrave said, that the so-called—he calls it a cut back. A better term is hold back. In other words, they charged us some 40 per cent more than they did any other customer in the United States. This hold-back provision was the only place, according to the Interstate Commerce Commission, where they invoked a similar cause. And, at various times, they held upwards of over $100,000 of our money. It meant that in order to utilize their services, we had to pay the extra 40 per cent. The only possible way we could get it back was to reship our products on the line of either Great Northern or Western

Pacific or both together. And, it also meant, as they provided in their agreement with us, and in their tariff schedule that the only way it could be recaptured is [Tr. 12] if we sold the products some place outside the pacific-mountain area. So, in other words, they prevented us from selling in what would be the market contiguous to our clients. And, it was necessary in all cases to ship our products more than a thousand miles away. This eventually, and we have charged in our complaint, led to the fact, among other activities, that we were forced out of business. And, one of the motivations for this—they have mentioned the other mill in Klamath Falls—Great Northern had another mill in Klamath Falls called the Klamath Basin Pine. And, this mill, as stated, was sold in 1961 to DiGiorgio Fruit Company. We had every reason to believe, and think we will establish that sale was for a grossly inadequate consideration. It was sold on a long-term basis. And, we also think it was also coupled with an agreement that it was necessary to utilize by DiGiorgio the various lines of the Defendants. So, they had a real motivation for this.

The things we are complaining about, as we have stated in our complaint, related to activities which have occurred within a period of four years preceding the filing of our complaint, which was filed in 1967. This essentially is it.

We might add that there are other factors that we think will be developed from time to time. So far, we have had [Tr. 13] only limited discovery methods. And, many of these matters which we have discovered recently have led us certainly to the conclusion that there are certain factors which could be developed as time progresses if your Honor permits.

The Court: Go ahead.

CONTINUED DIRECT EXAMINATION

By Mr. Buehner:

Q. How did this arrangement affect your lumber business in Klamath Falls? A. Actually, we were shut out

of the California market, which we had used for many years. The California market, to us, was a very good mixed car market. In mixed cars, we shipped numbers of species and number of items as against straight car shipment. In straight car shipments, you've got an entirely commodity situation. You have got 100 folds more mills shipping straight car; and very few and limited mills shipping mixed car.

We had a 16-car spot in our plant for making up mixed cars, which is quite an additional expense if you are not physically able to do so.

Now, the California market was a very attractive one to us and had been for many years. We had shipped California since 1933 about. We also shipped into Arizona. With this hold-back penalty arrangement of $30 a car that was harnessed to us by the railroad, we were unable to go into [Tr. 14] that market. We had to ship our lumber east into the transcontinental tariff area, which would be east of Denver; from Denver to Florida, to Portland, Maine, etc. and all through that triangular.

We have been in the lumber business, as I stated, since 1924, in Oregon. And, we are very familiar with this California market. The railroads with this $30 a car hold back, actually forced us out of business in 1963. We would be in business today if we hadn't had that $30 a car hold back. The vast and enormous amount of timber that is located in that Jellico area, there is 75, 85 million feet of that sold annually by the Forest Service every year. It's all contiguous to the railroad and to the spurs we built at Western Pacific in California at great expense. We still own those. We have kept them. We still have a plant site in Klamath Falls. When we liquidated our big plant in 1963, we elected to discontinue business there because the railroad had harnessed us with this $30 car hold back. And, they didn't do that for anybody else. They didn't do it for the mill they leased out with a profit sharing arrangement, which incidentally, if you will excuse me, your Honor, I will have to refer to the railroad——

The Court: Go ahead.

The Witness: — illegal procedure. They moved cars [Tr. 15] for three years or four years out of the California location that the Klamath Basin Pine had in conjunction with their logging operation which was known as Chiloquin Logging Company or Chiloquin Timber Company. They moved, in round figures, I am going to estimate, 10,000 cars out of there or more. It was a very illegal procedure. It was false billing. They set the rates down and up on the basis of gondolas. Gondolas have a limited footage. We didn't discover this until sometime back; a very short time ago, within a year. They moved these 10,000 gondola cars out of there. On a gondola rate, instead of using gondolas, they shipped flat cars. This is another phase that is not most irregular, it's just down right crooked. I have been at a loss to know just what to think of this matter here. You would think that people of the stature that the Great Northern Railroad officials are, would not come under the category of lying to their good customers. We shipped thousands of cars with those people at different times. Even the President of Great Northern lied to me. He wrote me a letter. I got one of the Vice-Presidents, Mr. Finley, who is now retired, he assured me everything was honest, fair and square and there was no gimmicks. Well, I wasn't sold down the river; but I believed him. And, the Executive Vice-President Tom Bowman in Seattle, I met him here in Portland. And, he said, "Well, we value your business. And, you have been very fine [Tr. 16] people with us for years. And, we wouldn't think of anything." We find upon discovery here a short time back that the Great Northern Railroad and the Klamath Basin Pine Mill have got a profit sharing agreement on this plant with the lease. And, it's stated right in there. It's in evidence in one of these exhibits here some place. But, it's in just regular typed out language and quite easy to explain.

Further for discovery, there are some things we are going to have to have. We would like to have the profit sharing arrangement. And, we would like to find out whether

any payment was made for that plant on the lease arrangement, such as canceled checks. In view of the high so-called trusted officials with their falsehoods to me in the past, I could believe anything about them, which is too bad.

Now, the California market was a very attractive and successful market for us for many years. But, when the hold-back penalty arrangement came in, we just—with the harness they put on us with the inbound rates excessively high and the penalty of $30 a car hold back, which we had to bring all the logs in, and warehouse them, more or less, with this $30 a day car, based on the penalty hold back, at one time, we had approximately 199,000 to $214,000 in a kitty account on deposit with the Great Northern Railroad [Tr. 17] in California and drawing no interest. Now, if we were unable to ship any lumber back east, we would be unable to get any of that money back until those cars were shipped out to the east.

Now, we couldn't ship to the south. The California market, again, with mixed cars, developed more dollars. It's a better price. You eliminate, as I stated before, a great deal of your competition. It's a highly selective market. And, it's very attractive. The reason it doesn't work too well in the east is because the mixed car market is serviced and served by a great number of distribution yards that have been installed in the last few years.

We found furthermore—just within the last year or so—we found that the railroad had been paying taxes on this profit that they had this profit sharing agreement with.

Mr. Cosgrave: Your Honor, just to clarify it for the record, I think the witness probably should indicate when he says the railroad, which. I don't think any of this is relevant.

The Court: I think this has been going far beyond any relevant issue.

Mr. Buehner, you should ask the witness specific questions and have the witness answer them.

Mr. Buehner: Very well, your Honor.

[Tr. 18] Mr. Cory: If your Honor, please, for the record, I'd like to make a motion to strike all of Mr. Ellingson's testimony except that which was responsive to Mr. Buehner's question.

The Court: I am going to deny the motion because I am going to consider the relevancy of the testimony anyway.

Q. (By Mr. Buehner) Mr. Ellingson, what was the effect of this $30 hold back on your working capital position? A. As I mentioned before it—well, it was very hampering. It limited our working capital and put us to a great disadvantage, because in the first place, the railroads in their partnership agreement with the Klamath Basin Pine Mill, they never had any hold back for them.

The Court: That was not the question. Did you have unlimited capital or were you borrowing money from the bank in order to continue your business? That is what he wants to know.

The Witness: We weren't broke, no, sir.

The Court: You have already testified that you had about $200,000 in an account for which you were not getting interest on?

The Witness: Yes, sir.

The Court: Did this $200,000 which was dead hamper you in your operation?

The Witness: Yes, sir; of course it did, sir, your [Tr. 19] Honor.

The Court: All right.

Q. (By Mr. Buehner) Mention was made of the sales price of the G.N. mill. You were acquainted with that mill, were you not? A. Yes, sir, quite well.

Q. In your opinion, what would be a fair market value of that mill when it was sold?

The Court: How would that go to prove or disprove any issue in connection with jurisdiction of this Court? I thought there had been testimony that this was done in 1961.

Mr. Buehner: If the Court please, the contract of sale is in evidence. And, that was a ten-year, 20 per cent type of

executory type contract which is in existence today, your Honor. DiGiorgio pays $10,000 a year plus five per cent interest on it.

The Court: What difference would that make?

Mr. Buehner: Well, your Honor, we are prepared to show that the true value of that mill was over a million dollars.

Number two, we are prepared to show by record, that the Great Northern Railway Company at the time, from their own record, did not offer it to anyone else in the area with the exception of Modoc and specifically denied us the [Tr. 20] right to purchase.

The Court: What is it you want him to answer?

Mr. Buehner: Number one, I want him to answer whether the mill was ever offered to him.

The Court: Was the mill ever offered to you?

The Witness: No, your Honor.

The Court: What is the next one?

Mr. Buehner: The value of the mill and what a lumberman would reasonably put the value on that mill.

The Court: In your opinion, what would be the reasonable value of that plant at the time it was sold?

The Witness: I have an answer, your Honor.

The Court: Go ahead.

The Witness: It's not two words.

The Court: Go ahead.

The Witness: Well, I have been in the lumber business a long time, 30 years. That plant—the Klamath Basin Plant was about 25-30 per cent larger in square footage. Naturally, square footage is the basis of any cost. Our plant was insured for over a million dollars. And, that plant over there was worth well over a million dollars plus. In my estimation, that plant has an insurable replaceable value of approximately four million dollars.

The Court: Four million dollars?

The Witness: Yes, sir.

[Tr. 21] The Court: All right.

The Witness: You can check that.

The Court: That's all right. Go ahead.

Q. (By Mr. Buehner) Did that mill compete with your mill in the market place? A. That mill competed with our mill in the market place very much for many years. We lost orders to them back and forth that we are aware of.

Q. Do you know as a fact, whether the Forest Service from, say 1963 to date is selling approximately 80 million feet a year to Jellico Spur Track and Poison Lake Spur Track? A. Yes, sir. In the Poison Lake and Chiloquin area, they are selling 75, 80, 85 million feet every year in that immediate vicinity. That was available to Klamath Falls.

Q. Was that an important source of your timber supply? A. That was a very important source of our timber supply; because we wouldn't have gone down there and spent approximately $50,000 on two railroad spurs just to log 15 million feet—15 million to 20 million feet of logs. The area is still producing in excess of 80 million feet of logs per year. And, in all probability, it's projected by the Forest Service themselves that the cut will be increased. We had the capacity at that time in Klamath Falls, prior to June, July of '63 to handle 65 million to 75 million feet capacity per year with two mills.

[Tr. 22] The Court: Do you have anything further?

Mr. Buehner: No further questions, your Honor.

The Court: Do you have any cross-examination?

Mr. Cosgrave: Yes.

CROSS-EXAMINATION

By Mr. Cosgrave:

Q. Mr. Ellingson, you have previously testified concerning the matter of rates, first before the Interstate Commerce Commission in the hearing on the petition which resulted—first, on July 8, 1958, in a hearing before the Pacific South Coast Freight Bureau with respect to Proposal No. 7363 of these rates. Do you recall that, sir?

The Court: Are they in evidence?

Mr. Cosgrave: There is no record of that that we have, your Honor.

The Court: All right.

A. I don't remember whether I do or don't. The Pacific South Coast Tariff Bureau, whenever that hearing was, if this is what we are talking about, frankly I don't know, they denied me any record of that hearing. So, I don't know.

Q. My only question, Mr. Ellingson, is whether you appeared in 1958 before the Pacific South Coast Freight. I am not saying what the particular testimony was. Did you appear there with respect to rates? A. In generalities, probably, yes.

[Tr. 23] Q. Then, Mr. Ellingson, you appeared and testified in the ICC proceedings in accordance with the documents which are the three volume-record of that proceeding? A. Yes, sir.

Q. Then, sir, you also appeared in the State Court action that you brought here in Multnomah County; is that right, sir? A. No—oh, yes.

Q. Then, your deposition was taken as indicated by the document which is in evidence; is that correct? A. Yes. The deposition was taken last fall.

Mr. Cosgrave: I have no further questions, your Honor.

The Court: Mr. Cory, do you want to ask any questions?

Mr. Cory: Yes. I will ask just a few.

CROSS-EXAMINATION

By Mr. Cory:

Q. Mr. Ellingson, could you tell the Court the extent of the damage to your mill from the fire on July 16, 1961? You did have a fire then, did you? A. Well, Mr. Cory, we frankly had four fires. After the last fire—I'm sorry I can't give you a short answer to—after the last fire, the State Fire Marshal took it under consideration and came down to Klamath Falls on his own with one of the Pacific Coast Inspection Bureau men. And, they decided we had had four set fires by arson. You asked about [Tr. 24] July or what date, I don't know. I will just say we had four set fires in a period of years.

Q. But, getting back to the 1961 fire, according to my notes, it destroyed the power plant, fuel storage and

garage, would that be correct? A. It didn't—at no time, was the power plant ever destroyed. The fuel warehouse, yes, was destroyed one time for a period of time. And, the shop adjacent to it was destroyed.

Q. Well, after that July 19, 1961, fire, was your plant down and out of operation for a while? A. Well, I am sure it had to be. I am sure it had to be for a period of time. But, I can't identify that for you.

Q. Now, in your deposition, you mentioned another fire on Columbus Day, 1962? A. Yes, October, 1962.

Q. Could you tell the Court what damage occurred from that fire? A. Well, the damage at that time burned down the planing mill, which had two machines in it adjacent to a battery of eleven dry kilns. And, in 1957, I believe that plant shipped 59 million feet of lumber.

Q. Was the planing mill ever restored? A. The planing mill was not restored.

Q. So, after that fire, you never did produce any more [Tr. 25] finished lumber, did you, from your plant? A. Just a minute. We shipped our lumber in three masses after that. Some of it went rough dry, as is a procedure —usual procedure for some lumber; some of that lumber was taken to the Thomas Lumber Company in North Klamath Falls and was surfaced by that plant for us for a charge. Some of that lumber was loaded in boxcars and shipped north and east through northeastern Oregon at Baker at our other place and proceeded with milling and transit facilities and shipped to the east.

The Court: What is that issue on, Mr. Cory?

Mr. Cory: Well, it's the date of closure of the plant; and facts surrounding that, your Honor. I have no further questions.

Mr. Buehner: Your Honor, I'd like to say, I think the pretrial order stipulates that the plant was closed, I believe January 3, 1963, the Big Lake Plant—I mean July, 1963.

The Court: All right. Are all the briefs in on this issue now?

Mr. Cory: Yes.

Mr. Tilbury: Your Honor, I had one more my girl is typing up. I will try to have it this afternoon.

The Court: All right. You don't have to rush. I notice there quite a few briefs. They are not short. [Tr. 26] The issue is important. I assume that there are a number of cases cited. Get it in just as soon as you can conveniently do it.

Mr. Tilbury: Yes sir.

The Court: Is there anything else?

Mr. Cosgrave: I was going to say, Judge, you asked if everything was in. This decision—we were given a copy of this decision, Monday. It's attached to the Plaintiff's brief they filed Saturday. That was not answered in any reply. I think we might want to give the Court an explanation with respect to that case. It would be quite brief. It would perhaps be no more extensive than the page and a half I submitted to the Court this morning.

The Court: Is there a State Court action pending now?

Mr. Cosgrave: No, your Honor, a voluntary nonsuit was taken in that action on March 31, 1966, I believe.

Mr. Tilbury: It sounds about right.

Mr. Cosgrave: A copy of that complaint is marked as an exhibit here.

The Court: All right.

Mr. Buehner: Walter, I wanted to ask you, did you ever find the reply you were going to give me?

Mr. Cosgrave: Your Honor, for the record, Mr. Buehner has asked when we marked exhibits—he has listed the answer [Tr. 27] of the Western Pacific in the ICC case. He did not have it. And, I did not have a copy at that time. I will obtain it if he wants to put it in evidence. We will put it in.

The only other thing I would do, for the record, your Honor, I would move to strike all of Mr. Ellingson's testimony on the ground previously stated. And also upon the ground of the various defenses urged in the pretrial order and in our memorandum in this case.

The Court: All right.

Mr. Cory: I will join in the motion.

The Court: I assume that same motion was made by Great Northern.

Mr. Buehner: I would like to ask one other question, your Honor.

The Court: Go ahead.

Mr. Buehner: To your knowledge, has the hold-back provisions in these tariffs, are they in existence today?

Mr. Cosgrave: I will object to that, your Honor, upon the ground and for the reason this is determined in the ICC case, a copy of which opinion is introduced as an exhibit in this case.

Mr. Tilbury: It was determined to be illegal. But, they haven't changed it.

Mr. Buehner: The question is, your Honor: Is the tariff, that is the subject matter, in existence today?

[Tr. 28] The Court: Is that in existence today?

The Witness: Oh, yes. It's still in existence. But, we started shipping logs over the W.P. a long time ago.

The Court: Are you in business now, Mr. Ellingson?

The Witness: Yes, sir, your Honor.

The Court: Are you in the lumber business?

The Witness: Yes, sir.

The Court: In the Klamath Falls area?

The Witness: Well, we still have property down there and some spurs around. And, we are paying taxes. I live there. I actually operate plants in Baker, Oregon, plywood sheeting plant and a couple of sawmills.

The Court: I did not think you were broke, Mr. Ellingson. That was not the reason I asked you that.

The Witness: Yes, your Honor.

The Court: I want to announce that I am glad to hear the lumber business is good around Klamath Falls. My father lost my shirt there more than 60 years ago.

The Witness: We should get together, because I like history.

* * *

APPENDIX F

[The Interrogatories Set Out in Italics were Rejected by the Court]

APPENDIX F

Petitioner's Interrogatories

[The Interrogatories Set Out in Italics Were Rejected by the Court]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 67-316

ELLINGSON TIMBER CO., *Plaintiff*

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation and WESTERN PACIFIC RAILWAY COMPANY, *Defendants*

Plaintiff respectfully addresses the following interrogatories to defendant, Great Northern Railway Company, pursuant to the provisions of Rule 33, Federal Rules of Civil Procedure:

TO: Great Northern Railway Company, and to R. Paul Tjossem, Lawrence D. Silvernale, and Davies, Biggs, Strayer, Stoel & Boley, its counsel:

Preliminaries:

The word "defendant" as used in these interrogatories, shall refer to the defendant, Great Northern Railway Company, unless otherwise specifically stated.

"Defendant", or the word "you", and similar phrases, shall also include all subsidiaries, (including, but not limited to, Glacier Park Company, Inc.) of Great Northern Railway Company, unless otherwise specifically stated, and whether such subsidiaries are still in existence or not, and whether such subsidiaries are wholly are partially owned.

The word "Ellingson", or "plaintiff", or similar phrases, shall include Ellingson Lumber Co., a partnership and Ellingson Lumber Co., a corporation.

The word "log", "logs", or "lumber", encompasses timber, lumber, plywood and all other forest products.

The reference to a "year" is intended to include the entire year of any year mentioned, beginning with January 1st of the year mentioned, to and ending with December 31st. (Thus, for example, a reference to the 1960-7 period, includes the period January 1st, 1960 and ending with the present date.)

The term "Pacific Northwest" is intended to encompass (unless otherwise designated) Northern California, Washington, Idaho, Oregon and Montana.

Where questions are presented relating to rates, such rates are intended to cover joint, as well as separate rates.

The words "tariff", "tariffs", "contract", or "contracts", are intended to encompass all amendments and modifications to such fariffs, tariff, contract or contracts.

The term "Klamath Basin Pine Mills", "Klamath Lumber Company", "Weyerhaeuser Company" and "Di Giorgio Corporation" include their subsidiaries and affiliated companies.

These interrogatories are intended to be continuing in the event any of the answers to these interrogatories should prove to be incorrect, incomplete, outmoded, or superseded at a future date.

If a reference to a previous answer will fully answer the question presented, it is satisfactory with plaintiff if such reference is given.

Interrogatories:

(1) In your Fifth Defense, you refer to an agreement between carriers. With respect to such agreement please state:

(a) The date of such agreement;

(b) The parties to such agreement;

(c) The contents of such agreement (or if you prefer, please attach a copy of such agreement to your answers to these interrogatories;

(d) The date when such agreement was approved by the Interstate Commerce Commission.

(2) In what respect, if any, do you contend that plaintiff's complaint "fails to state an enforceable claim for relief against this defendant" in addition to those defenses specifically set forth in your answer?

(3) (a) Has the defendant been designated by its correct corporate name in this complaint?

(b) If not, what is the correct name?

(4) (a) Who were the principal corporate officers of defendant between the years 1960 and the present date?

(b) What are their present addresses?

(c) What positions did they occupy (for each officer named)?

(d) What position do they occupy at present?

(5) (a) What are the names of all your subsidiary corporations, between 1960-7 (both wholly and partially owned)?

(b) In each instance, please state the percentage of stock ownership in such corporation.

(c) What are the names of all corporations, partnerships, and joint enterprises, besides those mentioned, in which defendant had a proprietary or stock interest of any kind?

(d) In each instance, please state the nature and extent of such proprietary or stock interest.

(6) (a) Did you correspond with, or receive, correspondence from or exchange written memoranda or other written documents with or from Western Pacific Railroad Company relating to Ellingson from 1955-67, (besides work product of your attorneys)?

(b) If so, please list such documents by dates and authors, (or, if you prefer, please attach copies).

(c) What is the general subject matter of each such documents, (or, if you prefer, attach copies of such documents)?

(d) Who is the custodian of such records, and his present position?

(7) (a) Do you concede that the statements contained in paragraph V of Plaintiff's complaint relating to Great Northern are accurate?

(b) If they are not accurate, in what respects do you contend they are inaccurate?

(8) (a) For which lumber or timber companies did you haul products in Northern California or Southern Oregon during 1958-67?

(b) What were the approximate quantities of each product hauled for each of such companies during this period?

(c) Did any officer, director or agent of any company mentioned in your answer to (8) (a) occupy a position of any kind with your company, either as an officer, director or agent?

(d) If the answer to (c) is "yes", please list the names of such individuals, and the position which they occupied in your company and in the other company mentioned in (a).

(9) (a) Did you hold back sums of money for periods of time between 1957 and 1967, which had been paid to you by plaintiff?

(b) If the answer to (a) is "yes":

1) What sums were so held for each year between 1957-67? (Please state separately.)

2) What was the purpose of such holdback?

3) Under what circumstances could such sums be repaid to plaintiff?

4) Were similar holdbacks applied to any other shipper of lumber or timber products in Oregon, California, Washington, Idaho or Montana?

5) If the answer to (9) (b) 4) is "yes", please list such customers, and the amounts withheld for each year between 1957-67.

6) Do you concede that such holdback arrangements impaired plaintiff's ability to market its products to any extent?

(10) (a) Did you extend the same facilities, or make payment for the same facilities, on an equal basis to plaintiff as you extend to other shippers of log and timber products in the Pacific Northwest between 1957 and 1967?

(b) If the answer to (a) is "no",

1) Please list all instances in which facilties were extended to shippers which were not extended to plaintiff?

2) Please state the reason or reasons, in each instance, why the same facilities were not extended to plaintiff.

(11) (a) What log and timber hauling rates were in effect in the Pacific Northwest during the years 1960-7, (or, if you prefer, please attach applicable tariffs and contracts)?

(b) In each instance, please state whether such rates were contained in tariffs or in contracts, and whether such tariffs were published or not.

(c) Under what circumstances were contract rates extended, rather than the utilization of tariff rates?

(d) In the case of the tariffs, were such tariffs published, in each instance?

(e) If the answer to (d) is "no", please list all instances where they were not published.

(12) (a) In what locations in the Pacific Northwest does defendant share trackage with other carriers?

(b) With which other carriers are they shared (in each instance)?

(13) (a) Has defendant paid taxes of any kind for any sawmill, lumber mill or plywood plant in the Pacific Northwest from 1957-67, which mill ships its products to or from its mill utilizing services furnished in whole or in part by defendant?

(b) If the answer to (a) is "yes",

1) Please state the name and location of such mills;

2) Please state the amounts paid for each such mill;

3) Why were such payments made?

4) To whom were such payments made?

(14) (a) What rates were charged to the Klamath Basin Pine Mills and/or Klamath Lumber Company from 1957-1960 from points in Oregon and California for log and timber shipments? (Or, if you prefer, please attach a copy of applicable tariffs.)

(b) What services or facilities were provided by defendant to Klamath Basin Pine Mills and/or Klamath Lumber Company?

(c) What charges, if any, were made by defendant for such services or facilities?

(d) Was any property leased to Klamath Basin Pine Mills and/or Klamath Lumber Company?

(e) If the answer to (d) is "yes",

1) What property was so leased?

2) What rate was charged under such lease?

3) What payments were received?

(f) Was any property sold or being sold under contract, or otherwise, by defendant to Klamath Basin Pine Mills?

(g) If so:

1) What property?

2) What price was charged for each item of property so sold?

(15) (a) What rates were charged to the Klamath Lumber Company and/or Di Giorgio Corporation from 1960-7 from points in Oregon and California for log and timber shipments? (Or, if you prefer, please attach a copy of applicable tariffs.)

(b) What services or facilities were provided by defendant to Klamath Lumber Company and/or Di Giorgio Corporation?

(c) What charges, if any, were made by defendant for such services or facilities?

(d) Was any property or equipment leased to Klamath Lumber Company and/or Di Giorgio Corporation?

(e) If the answer to (d) is "yes",

1) What property was so leased?

2) What rate was charged under such lease?

3) What payments were received?

(f) Was any property or equipment sold or being sold under contract, or otherwise, by defendant to Klamath Lumber Company and/or Di Giorgio Corporation?

(g) If so:

1) What property or equipment?

2) What price was charged for each item of property or equipment so sold?

(16) (a) Did defendant have any proprietary interest of any kind in whole or in part in any lumber or sawmills in Oregon of California during 1955-67?

(b) If (a) is "yes", please state:

1) Name and location of such mills.

2) Nature and extent of ownership therein.

3) Time when such ownership existed.

(17) (a) Was a mill in or near Klamath Falls, which had been owned by Glacier Park Company and/or Klamath Basin Pine Mills sold during the period 1955-67 to Klamath Lumber Company and/or Di Giorgio Corporation or their subsidiaries or affiliates?

(b) If so, what were the terms of sale, including, (but not limited to) its sales price? (Or, attach the contract if you prefer.)

(c) What payments have actually been made?

(d) What items of equipment were included in such sale?

(e) What was the approximate fair market value of such mill on the date of such sale?

(f) What was its approximate rated capacity per 8 hour shift?

(g) What has been the annual production by such mill, since the date of sale?

(h) When did such sale take place?

(i) Which employees or officers of defendant are familiar with the terms of the sale, or with the negotiations which led up to the sale?

(j) What are the present addresses of such employees listed in response to 17 (i), and their present positions?

(k) To what extent did negotiations take place as a preliminary to such sale?

(l) With which other companies were negotiations conducted with the exception of Klamath Lumber Company and/or Di Giorgio?

(m) Was such advertised?

(n) If so, in what manner was it advertised?

(18) What amounts were paid each year by Ellingson to defendant during the years 1955-61 for log and timber movements from Poison Lake and Jellico, California to Klamath Falls, Oregon? (separately stated)

(19) (a) Which of your officers, agents and employees are familiar with the log and timber rates for products moving to and from lumber mills within 50 miles of Klamath Falls, Oregon from 1955-67?

(b) What are their present addresses?

(c) What has been their position with your company since 1955?

(20) (a) Was there a delay of any kind from 1955-67 in quoting log rates to plaintiff?

(b) If the answer to (a) is "yes", please state:

1) The extent of such delay.

2) The reason for such delay.

3) The person or persons who would be familiar with the facts.

(21) With respect to Weyerhaeuser Company and its operations from 1957-67 in Oregan and Northern California, please state:

(a) The general nature of the transportation furnished to them by defendant;

(b) Was such hauling done under the terms of a written contract;

(c) What were the provisions of such contract? (Or, if you prefer, please attach a copy of such contract to your answers.)

(d) What are the names and addresses of your custodians or custodian having charge of records in your control pertaining to log and timber hauls pertaining to Weyerhaeuser?

(e) Which of your officers are familiar with the hauling done by defendant for Weyerhaeuser Company and the rates charged?

(f) What are their offices (past or present) and present addresses?

(g) Did any of your representatives, agents or employees receive any compensation or other items of value from Weyerhaeuser, which sums were retained by such representatives, agents, or employees, and not paid over to Great Northern?

(h) If your answer to (g) is "yes", please state:

1) The names of such agents, representatives or employees.

2) The date of such payment or payments.

3) The amount involved.

4) The reason for such repayment.

(22) (a) What is your understanding of the term "flat rate-cutback"?

(b) Under what circumstances was it utilized between 1955-67 in the Pacific Northwest?

(c) What are the names and addresses of shippers during 1955-67 who were charged on this basis?

(d) What rates were charged to such shippers under this method?

(e) Why was it utilized by defendant?

(23) (a) To your knowledge, to what extent does the Western Pacific Railroad Company engage in business in the State of Oregon?

(b) To what extent do you have business relationships with Western Pacific of any kind which take place or relate to activities in the State of Oregon?

(c) What types of business relationships do you have in Oregon with Western Pacific?

(24) (a) Do you have contracts of any kind with Western Pacific Railroad Company?

(b) If the answer to (a) is "yes", please state:

1) The dates of such contracts.

2) The general nature of such contracts.

3) The effective dates of such contracts.

4) The areas affected by such contracts.

(25) (a) What sums were paid to you between 1955-67 by plaintiff by way of transportation tax?

(b) Were identical charges made to all other shippers of logs and timber products in the Pacific Northwest?

(c) If the answer to (b) is "no", please state:

1) The instances in which different charges were made.

2) The reason for the difference.

(26) (a) From which locations did you transport logs or timber products for Klamath Basin Pine Mills, or its successor in interest, Klamath Lumber Company and/or Di Giorgio Corporation, during 1955-67 in Oregon and California?

(b) What rates were charged in each instance?

(c) Were they permitted to use or to lease any of your facilities or equipment?

(d) If the answer to (c) is "yes", please state:

1) The nature of the equipment or facilities rented?

2) The terms of such lease?

(27) What is the rail mileage from each of the following locations to Klamath Falls, Oregon, when routed in the following manner:

California Location:	*Routing:*
(a) Poison Lake	*Poison Lake-Beiber-Lookout-Klamath Falls.*
(b) Jellico	*Jellico-Beiber-Lookout-Klamath Falls.*
(c) Hambone	*Hambone-Lookout-Klamath Falls.*
(d) Hambone	*Hambone-Mt. Shasta-Klamath Falls*

California Location:	*Routing:*
(e) Ash Creek	*Ash Creek-Lookout-Klamath Falls.*
(f) Ash Creek	*Ash Creek-Mt. Shasta-Klamath Falls*
(g) Esperanza	*Esperanza-Lookout-Klamath Falls.*
(h) Esperanza	*Esperanza-Mt. Shasta-Klamath Falls.*
(i) Bartle	*Bartle-Lookout-Klamath Falls.*
(j) Bartle	*Bartle-Mt. Shasta-Klamath Falls.*
(k) Mt. Shasta	*Mt. Shasta-Lookout-Klamath Falls.*
(l) Mt. Shasta	*Mt. Shasta-Klamath Falls.*
Oregon Location:	
(m) Bly	*Bly-Klamath Falls.*
(n) Yamsey	*Yamsey-Klamath Falls.*
(o) Chemult	*Chemult-Klamath Falls.*
(p) Chemult	*Chemult-Bend.*
(q) Sutherlin	*Sutherlin-Springfield.*
(r) Swisshome	*Swisshome-Coos Bay.*
(s) Molalla	*Molalla-Dallas.*
(t) Seneca	*Seneca-Hines.*
(u) Mazama	*Mazama-Klamath Falls.*

(28) (a) Do you concede that this Court has jurisdiction?

(b) If not, in what respects do you contend this Court does not have jurisdiction?

(29) (a) Do you concede this Court has venue?

(b) If not, in what respects do you contend this Court does not have jurisdiction [*sic*]

(30) (a) Do you have, or have you had, between 1955-67, an interest in the O C & E Railroad?

(b) If so, what is the extent of such interest?

(c) Has this railroad failed to show a profit for many years?

(31) (a) Do you have, or have you had, an interest in Klamath Basin Pine Mills and/or Klamath Lumber Company between 1966-67?

(b) If so, what is the extent of such interest?

(32) (a) Do you have, or had you had, an interest in Chiloquin Timber Company between 1966-67?

(b) If so, what is the extent of such interest?

(33) Have any of the following individuals been employees, agents, officers or stockholders in your company between 1955-67, and, if so, please designate their capacity.

(a) A. N. Beals

(b) King Gray

(c) Wilbur L. Kesterson

(d) M. A. Wyman

(e) M. H. Wyman

(f) D. E. Wyman

(g) W. I. Kesterson

(h) Ed Finley

(34) (a) Has your company had any investment or financial interests in enterprises in which any of the individuals listed in (33) supra, have been owners, or partial owners, between 1955-67?

(b) If the answer to (a) is "yes", please designate the extent of such interest in each instance.

(35) (a) Which of your officers, agents or employees made or participated in the decision which led to the establishment of log rates for plaintiff?

(b) What are their present addresses?

(36) (a) Were the rates for hauling logs or timber products charged to Ellingson increased or decreased at any time between 1955-67?

(b) If the answer to (a) is "yes", please state:

1) The dates when such raises or decreases took place;

2) The extent of such raises or decreases;

3) The reasons for such raises or decreases.

(37) (a) Were the rates for hauling logs or timber products charged shippers for hauling from Ash Creek, California to Klamath Falls, Oregon, increased or decreased at any time between 1955-67?

(b) If the answer to (a) is "yes", please state:

1) The dates when such raises or decreases took place;

2) The extent of such raises or decreases;

3) The reasons for such raises or decreases.

(38) (a) What arrangements did you have with Ellingson for the use of spur tracks owned or leased by defendant during 1955-67?

(b) Was any money or other consideration paid by Ellingson for the use of such facilities?

(c) If so, please specify the extent of such payments, and the facilities for which such payments were paid.

(d) Did you pay Ellingson any money or any other thing of value for the use or lease of any spur track owned or leased by Ellingson?

(e) Was any money or other consideration paid by Ellingson for the use of such facilities?

(f) If so, please specify the extent of such payments, and the facilities for which such payments were paid.

(39) (a) What arrangements did you have with Klamath Lumber Company and/or Klamath Basin Pine Mills for the use of spur tracks owned or leased by defendant during 1955-67?

(b) Was any money or other consideration paid by Klamath Lumber Company and/or Klamath Basin Pine Mills for the use of such facilities?

(c) If so, please specify the extent of such payments, and the facilities for which such payments were paid.

(d) Did you pay Klamath Basin Pine Mills and/or Klamath Lumber Company any money or any other thing of value for the use or lease of any spur track owned or leased by Klamath Basin Pine Mills and/or Klamath Lumber Company?

(e) Was any money or other consideration paid by Klamath Basin Pine Mills and/or Klamath Lumber Company for the use of such facilities?

(f) If so, please specify the extent of such payments, and the facilities for which such payments were paid.

(40) (a) *What arrangements did you have with Weyerhaeuser Corporation for the use of spur tracks owned or leased by defendant during 1955-67?*

(b) *Was any money or other consideration paid by Weyerhaeuser Corporation for the use of such facilities?*

(c) *If so, please specify the extent of such payments, and the facilities for which such payments were paid.*

(d) *Did you pay Weyerhaeuser Corporation any money or any other thing of value for the use or lease of any spur track owned or leased by Weyerhaeuser Corporation?*

(e) *Was any money or other consideration paid by Weyerhaeuser Corporation for the use of such facilities?*

(f) *If so, please specify the extent of such payments, and the facilities for which such payments were paid.*

(41) (a) *Were there any occasions between 1955-67, when your company did not make log cars available within 48 hours for shipments by Ellingson when you were requested to do so by Ellingson?*

(b) *If the answer to (a) is "yes", please specify:*

1) *The time when such delays occurred.*

2) *The reason for such delay.*

(c) *Did your company at any time, indicate to Ellingson that log cars would not be made available unless Ellingson agreed to ship all products, after they had been manufactured by Ellingson, over facilities of defendant?*

(d) If the answer to (c) is "yes", please state:

1) The occasion, or occasions, when such statements were made.

2) The individual who made such statements.

3) Whether such individual was authorized to make such statements or statement.

(42) (a) Were switching charges imposed by defendant in Klamath Falls, or within 2 miles of Klamath Falls, at any time between 1955-67?

(b) To which places were they applied?

(c) What was the extent of such charges?

(d) When were such charges applied?

(e) From which mills were such charges collected?

(f) Were the charges precisely identical for all mills?

(g) If they were not identical, please specify:

1) The instances when they were not identical.

2) The reason or reasons why they were not identical.

(43) (a) What was the purpose for utilizing the "flat rate-cutback" plans by defendant?

(b) Were they utilized for any other shippers with the exception of Ellingson at any time between 1955-67 in the Pacific Northwest?

(c) If the answer to (b) is "yes", please specify:

1) The names of such shippers.

2) The places where such rates were applicable.

3) The reason or reasons for such plans.

4) The time when they were in effect.

(44) (a) Did your company extend a millage in transit rate to any lumber or timber company in the Pacific Northwest during the period 1955-67?

(b) If so, please describe:

1) The instances in which it was utilized.

2) The times when it was employed.

3) How were the charges calculated in each instance?

(45) (a) Were log shipments made by gondola type equipment between 1955-67 over your facilities originating from Ash Creek, Esperanza or Bartle, California, from 1955-67 and destined for the Klamath Falls area?

(b) If so, which shippers utilized such equipment?

(c) In general terms, were such shipments rare, frequent or only sporadic?

(d) Was a specific rate charged which was applicable to gondola car movements?

(e) Did Ellingson make shipments utilizing such equipment?

(f) Was such equipment made available to Ellingson?

(46) (a) In addition to the contract rates for shipments between 1955-67, were any additional allowances, concessions, credits, or things of value paid to Weyerhaeuser Corporation for shipments made by such company over your trackage, (either owned or leased jointly or individually)?

(b) If the answer to (a) is "yes", please state:

1) The nature of such payments, concessions, things of value, allowances, or credits.

2) The extent of such payments, concessions, things of value, allowances or credits.

3) The time or times they were given or allowed.

(47) (a) *Do you concede that the rate charged per mile for shipping lumber products into Klamath Falls from Poison Lake and Jellico, California was among the highest rates in the Pacific Northwest?*

(b) *If the answer to (a) is "no", please state, in percentage terms, how plaintiff's rates compared with those charged other shippers for hauling similar type products.*

(c) *If the answer to (a) is "yes", please state the reason it was among the highest rates.*

(48) (a) *Did any of your officers or employees hold meetings with representatives of Western Pacific Railroad Company between 1955-67, during which the subject of log rates in the Pacific Northwest was discussed?*

(b) *If "yes", please state:*

1) *The names of those who attended who represented Great Northern.*

2) *The names of those who attended who represented Western Pacific.*

3) *The date or dates of such meeting.*

4) *The nature of any agreements, whether oral or written which were discussed.*

5) *The nature of any agreements, whether oral or written, which were reached.*

6) *The place of such meetings.*

7) *Were written notes or minutes of such meeting maintained?*

8) *Who is the custodian, and what is his present address, of any such notes or minutes?*

(49) (a) *Were any switching charges levied by defendant to any mill either in, or within five miles, of Klamath Falls, Oregon at any time from 1957-67?*

(b) If the answer to (a) is "yes", please state:

1) The circumstances under which such charges were made.

2) The companies who made such payments.

3) The amounts paid to defendant by such companies.

(50) (a) *What is meant by the term "mixed cars"?*

(b) Was plaintiff permitted to make mixed car shipments between 1957-67?

(c) Were other lumber or timber compgnies permitted to make mixed car shipments in the Pacific Northwest between 1957-67?

(d) If the answer to (c) is "yes", please state:

1) The names of the companies who made such shipments.

2) The period of such shipments.

3) The extent to which it was done.

(e) Did plaintiff receive precisely the same type of treatment with respect to mixed car shipments as other mills in the Pacific Northwest?

(f) If there was a difference, please state the reason for such difference.

(51) (a) *Were the rates charged to plaintiff from 1957-67 affected by the number of log cars which comprised a single shipment?*

(b) To what extent did it vary?

(c) Were precisely the same variations made to other shippers of lumber or timber products from 1957-67?

(d) If there was a difference, please explain:

1) The instances in which there was a variation.

2) The reason for such variance, if any.

(52) (a) Was Ellingson precluded from using any log dumps by your company during 1957-67?

(b) If so, please state:

1) When this occurred.

2) Why this occurred.

3) Where this occurred.

(53) (a) Did your company or Glacier Park Company, Inc., buy or lease any equipment for Klamath Basin Pine Mills or Klamath Lumber Company or Weyerhaeuser Company during 1957-67 in the Pacific Northwest?

(b) If so, please state:

1) The times of such purchases.

2) The reason for such purchases.

3) Was any similar equipment purchased for plaintiff:

4) If the answer to (3) is "no", why not?

(54) (a) Did your company pay or credit Klamath Basin Pine Mills, Klamath Lumber Company, or Weyerhaeuser Company for log dump work during 1957-67?

(b) If so, please state:

1) The times of such payments or credits.

2) The reason for such payments or credits.

(55) (a) *Did you furnish stakes for log cars for any lumber or timber company in the Pacific Northwest between 1957-67?*

(b) *If the answer to (a) is "yes", please state the dates, places, and companies for whom they were purchased.*

(c) *Were similar stakes made available to plaintiff?*

(d) *If the answer to (c) is "no", why not?*

(56) (a) *Did you make any rebates or issue any credits of any kind to any lumber or timber company in Oregon or Northern California between 1957-67, not otherwise mentioned in your prior answers to the preceding interrogatories?*

(b) *If so, please state the:*

1) *Date;*

2) *Place;*

3) *Amount;*

4) *Reason for such rebates.*

(57) (a) *Do you have in your possession or subject to your control the equipment register which pertains to the mill in or near Klamath Falls, Oregon, operated by Klamath Basin Pine Mills and/or Klamath Lumber Company?*

(b) *If so, please state the name and address of the custodian of such register.*

(58) (a) *What are the names of all your employees or former employees who dealt with plaintiff during the period of your business relationship with him.*

(b) *What were their positions with you during the period?*

(c) *What are their present positions?*

(d) *What are their present addresses?*

(59) (a) What were the names of your branches and departments from 1957-67?

(b) What were the names of the individuals having charge of such branches or departments? (Or, if you prefer, please attach a copy of your reports to stockholders or similar report, if it contains this information.)

(c) What are the present addresses of such individuals?

(60) Please identify all documents or other papers or letter upon which you rely as constituting proof or as containing or being evidence of any of the allegations contained in your answer in this case?
With respect to each such document, letter or paper, please state:

(a) The date thereof;

(b) The nature and general description thereof;

(c) The name of the writer;

(d) The name of the addressee (if any); and

(e) The name and address of the person who presently has custody of the original.

(61) (a) Which of your officers, employees, agents, or representatives or former employees, officers, agents or representatives do you feel can establish the statements contained in your answer?

(b) What are their present addresses and positions?

(62) (a) Do you concede you violated the antitrust acts in any respect with respect to your dealings with Ellingson?

(b) If so, in what respect or respects?

(c) Are you willing to permit this case to proceed to trial with the issues solely limited to the question of damages?

(63) (a) Do you concede defendant is engaged in interstate commerce?

(b) Do you concede plaintiff is engaged in interstate commerce?

(c) Do you concede that your business relationship with plaintiff affected interstate commerce?

ROGER TILBURY
HENRY A. BUEHNER
Attorneys for Plaintiff

APPENDIX G

District Court Opinion and Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 67-316

ELLINGSON TIMBER CO., *Plaintiff*

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation; and WESTERN PACIFIC RAILROAD COMPANY, *Defendants*

Opinion and Order

June 20, 1968

SOLOMON, Judge:

OPINION AND ORDER

Ellingson Timber Co. (plaintiff) filed an action for damages from the Great Northern Railway Company and the Western Pacific Railroad Company (defendants) for violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Plaintiff's complaint, filed June 8, 1967, alleges that the defendants conspired to restrain and monopolize the lumber trade in the Klamath Falls, Oregon, area by charging plaintiff unfair and excessive rates and by discriminating in favor of plaintiff's competitors.

Defendants contend (1) that this action is barred by the four-year statute of limitations, 15 U.S.C. § 15(b); and (2) that this Court has no jurisdiction because all of the defendants' alleged illegal activities concern rates which the Interstate Commerce Commission approved. The issues raised by the defendants' contentions were segregated for trial.

The statute of limitations in a civil antitrust action runs from the commission of the last overt act which causes damage. *Steiner* v. *20th Century-Fox Film Corporation*, 232 F.2d 190 (9th Cir. 1956); *Garlick* v. *Goerlich's, Inc.*, 323 F.2d 854 (6th Cir. 1963). Where there is a continuing conspiracy, the statute runs from the time the defendants last invaded the plaintiff's rights. *Highland Supply Corporation* v. *Reynolds Metals Company*, 327 F.2d 725 (8th Cir. 1964); *Steiner* v. *20th Century-Fox Film Corporation*, supra.

Plaintiff made no shipments over the defendants' lines after June 17, 1958. Its operations were sharply curtailed when portions of its mill were destroyed by fire in June, 1961, and October, 1962. Plaintiff ceased all operations in the Klamath Falls area on July 3, 1963.

Plaintiff's allegation that it has been damaged by acts of the defendants which occurred "within a period less than four years prior to the filing of this complaint" is not supported by any evidence. I find that any act of either defendant which may have damaged the plaintiff occurred prior to June 8, 1963.

There is no merit in plaintiff's contention that defendants fraudulently concealed their activities. Plaintiff knew of all of the defendant's alleged illegal activities prior to June 8, 1963.

On the issue of jurisdiction, the evidence, particularly the testimony of Mr. Ellingson, shows that the plaintiff's claim is no more than an attack on rates which plaintiff unsuccessfully challenged before the Interstate Commerce Commission. *Ellingson Lumber Company*, 310 I.C.C. 249 (1960). Under these circumstances, this Court is without jurisdiction to consider plaintiff's claim. See *Standard Oil Company (Indiana)* v. *United States*, 283 U.S. 235 (1931); *Keogh* v. *Chicago & Northwestern Railway Company*, 260 U.S. 156 (1922). Although plaintiff asserts that defendants have continued to discriminate in favor of plaintiff's competitors and that the Commission's decision is not involved

in this action, plaintiff failed to produce any evidence to support these vague allegations.

The action is dismissed.

This opinion shall constitute findings of fact and conclusions of law under Rule 52(a), Federal Rules of Civil Procedure.

Dated this 20th day of June, 1968.

GUS J. SOLOMON
United States District Judge

APPENDIX H

Court of Appeals Opinion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,362

ELLINGSON TIMBER COMPANY, *Plaintiff-Appellant*

v.

GREAT NORTHERN RAILWAY COMPANY, a corporation, and WESTERN PACIFIC RAILROAD COMPANY, a corporation, *Defendants-Appellees.*

Appeal from the United States District Court for the District of Oregon

[Decided: April 21, 1970]

Before: HAMLEY and BROWNING, Circuit Judges, and *BYRNE, District Judge

PER CURIAM:

Plaintiff-appellant operated a lumber mill at Klamath Falls, Oregon. Defendants-appellees transported logs to plaintiff's mill and reshipped the finished lumber to various markets.

Plaintiff filed this suit to recover treble damages for alleged violations of the Sherman Act, 15 U.S.C. § § 1, 2, 15. Defendants pleaded two affirmative defenses: first, that the action was barred by the four-year statute of limitations (15 U.S.C.A. § 15(b)); and, second, that the district court lacked subject matter jurisdiction because the matter

*Honorable William M. Byrne, Senior Judge of the United States District Court for the Central District of California, sitting by designation.

complained of had been litigated before the Interstate Commerce Commission in a prior proceeding initiated by plaintiff and had been decided against plaintiff.

These defenses were segregated for separate trial to the court. After trial the court dismissed the action on both grounds. In sustaining the second ground the district court said:

> "On the issue of jurisdiction, the evidence, particularly the testimony of Mr. Ellingson, shows that the plaintiff's claim is no more than an attack on rates which plaintiff unsuccessfully challenged before the Interstate Commerce Commission. *Ellingson Lumber Company*, 310 I.C.C. 249 (1960). Under these circumstances, this Court is without jurisdiction to consider plaintiff's claim. See *Standard Oil Company (Indiana)* v. *United States*, 283 U.S. 235 (1931); *Keogh* v. *Chicago & Northwestern Railway Company*, 260 U.S. 156 (1922). Although plaintiff asserts that defendants have continued to discriminate in favor of plaintiff's competitors and that the Commission's decision is not involved in this action, plaintiff failed to produce any evidence to support these vague allegations."

We agree with the trial court.

Plaintiff's principal contentions before both the Commission and the trial court were that certain of defendants' rates were unreasonable and discriminatory and that defendants gave preferences to a competitive mill owned by defendant Great Northern. The Commission decided these issues against plaintiff. *Ellingson Lumber Co.* v. *Great Northern Ry.*, 310 I.C.C. 249, 256 (1960). The cases cited by the trial court preclude relitigation of the issues in a private antitrust treble damage action in a district court. *See also Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 453, 457-58 (1945); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 n.8 (1968); *cf. Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 224 (1966).

It is true that the Commission found one aspect of defendants' so-called "cutback" rate unlawful. But under the

authorities cited (*see, e.g., Standard Oil Co. v. United States*, 283 U.S. 235, at 240-41 (1931)), submission of this issue to the Commission in support of a claim for reparations constituted an election of remedies; and plaintiff is bound by the election even though it is now dissatisfied with the remedy. Moreover, contrary to plaintiff's contention, the Commission held the "cutback" rate lawful in all respects but one, and plaintiff's own evidence established that the consequences of which plaintiff complains flowed from the rate in the form approved by the Commission.

The record also supports the trial court's conclusion that the miscellany of charges which plaintiff argues were not before the Commission (alleged preferences to defendant Great Northern's Klamath Falls mill, circumstances surrounding the sale of that mill, and alleged preferences to another mill competing with plaintiff) were merely vague allegations, insufficient to impair the overwhelming showing that the real substance of plaintiff's complaint had been submitted to the Commission and resolved in defendants' favor.

Plaintiff contends that the court improperly limited discovery.

Under Federal Rule of Civil Procedure 42(b) the court had power "in furtherance of convenience or . . . when separate trials will be conducive to expedition and economy . . . [to] order a separate trial . . . of any separate issue or issues." It is implicit that the court also had power to limit discovery to the segregated issues. *See Hayden v. Chalfant Press, Inc.*, 281 F.2d 543, 544 (9th Cir. 1960); Decker & Allard, Separation and Separate Presentation of Issues in Antitrust Cases, 4 Corp. Prac. Comm. 40, 61 (1962). One of the purposes of Rule 42(b) is to permit deferral of costly and possibly unnecessary discovery proceedings pending resolution of potentially dispositive preliminary issues. *See* Schwartz, Severance—A Means of Minimizing the Role of Burden and Expense in Determining

the Outcome of Litigation, 20 Vand. L. Rev. 1197, 1204-05 (1967); Note, Separate Trial of a Claim or Issue in Modern Pleading, 39 Minn. L. Rev. 743, 758 (1955).

As we read the record, the only limitation which the trial court imposed upon discovery was to restrict it to the segregated issues. The court's disallowance of certain of plaintiff's interrogatories was expressly subject to the right to file supplemental interrogatories relevant to the segregated issues, if plaintiff wished to do so, and plaintiff apparently did not. So far as the record shows, plaintiff did not seek to take depositions, secure the production of documents, or request admissions.

After completion of briefing we raised the question whether there had been a waiver of a right to jury trial on the segregated issues. The parties submitted supplemental memoranda addressed to that issue. Assuming the point may be considered though not raised below, the record establishes a waiver.

Affirmed.

No. 716

OCT 19 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1970

ELLINGSON TIMBER COMPANY,

Petitioner,

v.

GREAT NORTHERN RAILWAY COMPANY, a corporation; and WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GREAT NORTHERN RAILWAY COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GREAT NORTHERN RAILWAY COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS

On June 20, 1968 the district court entered its Opinion and Order which constituted its findings of fact and conclusions of law under Rule 52(a), Federal Rules of Civil Procedure (App. 79(a)). Although not officially reported, the decision is printed in CCH Trade Cases (1968), § 72.506.

The unanimous Opinion of the United States Court of Appeals for the Ninth Circuit, dated April 21, 1970 (App. 81(a) - 84(a)) is reported at 424 F.2d 497.

STATEMENT

Respondent Great Northern vigorously objects to the unwarranted personal attack made against the experienced and respected district judge by new counsel who represent petitioner for the first time in this Court. It is rash and reckless to charge that the trial court ". . . flagrantly abused its discretion by prematurely and improperly segregating two affirmative defenses for separate trial" (Pet. p. 8); that the court "arrogated to itself" the role of factfinder despite petitioner's claimed insistence on a jury trial (Id.); that the court arbitrarily denied petitioner a reasonable opportunity for discovery (Pet. p. 18), and that the judge's conduct throughout ". . . represents such a stark departure from the accepted and usual course of judicial proceedings as to warrant this Court's exercise of its supervisory powers over the federal judiciary" (Pet. p. 18). These baseless charges result from counsel's distortion of the trial proceedings.

In fact, the record shows that on August 21, 1967, several weeks after repondents had taken the deposition of Mr. Ellingson, petitioner's principal officer (Def.'s pretrial Exhibit 31), the district court set the case for pretrial in October on the segregated is-

sues of statute of limitations and subject matter jurisdiction. At the same time, the court ruled that petitioner's contemplated discovery should be limited to the segregated issues. Petitioner's counsel did not object.

On August 25, 1967 petitioner filed 63 multiple-part interrogatories against Great Northern (Appendix F), which thereafter answered seven and filed objections to the remainder on the ground that they did not relate to the segregated issues (R. pp. 36-48).

On October 16, 1967 these objections were argued before the court (Appendix G). After extensive arguments, the court directed plaintiff's counsel to file ". . . new interrogatories in clear, understandable and succinct language. Set out exactly what you want in not more than 15 interrogatories in the first instance. Then, if these are relevant, you can subsequently apply for more and I will give them to you" (App. pp. 24a-25a). Petitioner's counsel did not object to this ruling.

On October 25, 1967 petitioner filed 12 interrogatories which were claimed to relate to jurisdiction. On November 6, 1967, respondent Great Northern filed answers to interrogatories 4, 5, 6, 8, 9, 11 and 12, and filed objections to interrogatories 1, 2, 3, 7 and 10, on the ground that they were harassing, burdensome and oppressive in requiring the railroad to review all its 1958-1967 records relating to freight shipments in the states of Oregon and California and

to compile and tabulate the results of this very extensive research (R. p. 77).

These objections were heard by the court on November 20, 1967. However, petitioner has not included a transcript of this hearing in its appeal record. A docket entry does show that an order was entered on November 20, 1967 ". . . that if counsel cannot determine matter deft. should file argument and briefs by 11/27/67; ptff. file arguments and briefs by 12/4/67 and these arguments and briefs will be referred to Judge Solomon for a ruling" (Appendix A, p. 2a).

The record fails to show that any further briefs were filed or argument made on the subject of interrogatories. While there is a docket entry under date of December 21, 1967 setting a hearing on objections to interrogatories for January 2, 1968, the transcript of the hearing on that date (Appendix D) indicates only that on the application of petitioner's counsel, the court stated: "You can file a supplemental list of interrogatories" (App. p. 29a); and then said: "If you don't get the information you need, you can take it up with me" (App. p. 30a). A docket entry of the same date directed that petitioner's counsel file "supplemental list of interrogatories relating to question of jurisdiction" (Appendix A, p. 3a). However, no further interrogatories were filed.

On the subject of pretrial discovery, petitioner cannot dispute the finding of the Court of Appeals: "So far as the record shows, plaintiff did not seek to take

depositions, secure the production of documents, or request admissions" (Appendix H, p. 84a).

Although petitioner attached a demand for jury trial to its complaint (Appendix B, p. 14a), the pretrial order on the segregated issues which was approved in writing by all counsel and filed on January 29, 1968, nearly five weeks prior to trial, provided in part: "The Court has heretofore ruled that the issue of this Court's jurisdiction over the subject matter of this action, and the issue of the statute of limitations should be segregated for separate trial before the Court." (R. p. 111).

Neither at pretrial conference, nor at the trial on March 4, 1968, did petitioner's counsel object to a nonjury trial on the segregated issues, nor did petitioner raise the question on its appeal. The Court of Appeals, which raised the question *sua sponte* prior to the argument, correctly concluded that even assuming that the point might be considered, though not raised below, the record established a waiver (Appendix H, p. 84a).

While petitioner attempts to infer that the trial court summarily disposed of the case, the record shows that at the March 4, 1968 trial, petitioner was in no way curtailed in presenting testimony, and that all the documents listed as exhibits in the pretrial order were received in evidence.

Following the trial, counsel for all parties had an opportunity to submit further briefs, following which

the court rendered its opinion and order containing, among others, the following dispositive findings of fact (Appendix G):

> 1. Any act of either respondent which may have damaged plaintiff occurred prior to June 8, 1963;
>
> 2. Petitioner knew of all the respondents' alleged illegal activities prior to June 8, 1963;
>
> 3. The evidence, and in particular the testimony of Mr. Ellingson, shows that petitioner's claim was no more than an attack on rates which petitioner unsuccessfully challenged before the Interstate Commerce Commission;
>
> 4. Petitioner failed to produce any evidence that respondents had continued during the period from 1963-1967 to discriminate in favor of petitioner's competitors, and that the Commission's decision was not involved in this action.

Based upon these findings of fact, the trial court dismissed this action on the ground that it was barred by the four-year statute of limitations contained in 15 U.S.C.A. § 15b, and because the court was without jurisdiction to consider petitioner's claim. The Court of Appeals has affirmed and has determined that the trial court's findings were supported by substantial evidence.

ARGUMENT

The record presents no legal issue which will govern other cases, but merely a unique factual situation of interest only to the parties. There is no substantial question as to the proper interpretation of the antitrust laws, and no issue of public importance.

I

While no direct conflict of decision is pointed out by petitioner, an important question of antitrust trial practice is asserted in connection with petitioner's principal claim that the trial court's exercise of its powers to order a separate trial of separate issues under Rule 42(b) of the Federal Rules of Civil Procedure constituted a flagrant abuse of discretion (Pet. p. 8). The same argument was rejected by the Court of Appeals in an opinion which correctly quotes the material portions of Rule 42(b). On the other hand, the petition fails to point out that a district court may order a separate trial of any separate issue ". . . when separate trials will be conducive to expedition and economy." By its affirmance, the Court of Appeals has approved the trial court's exercise of discretion in this regard. This Court should not be asked to review the exercise of a discretionary power by two federal courts, except perhaps in a very exceptional situation, not present here, involving fundamental constitutional rights.

II

A second alleged reason for review is petitioner's claim that the decision of the Court of Appeals con-

flicts with the decisions of this Court. It is contended that the conflict ". . . resulted from the district court's ruling, as a matter of law, that it lacked jurisdiction to consider the legality under the antitrust laws of a conspiracy that had achieved its unlawful ends *partly* through use of a common carrier rate that had previously been found consistent with the requirements of the Interstate Commerce Commission" (Pet. pp. 8-9).

Even if the issue decided by the lower courts had been the one now presented by petitioner, no conflict of decision is pointed out in the petition. The decisions of the courts below are completely consistent with this Court's decision in *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156, 162-163 (1922), reaffirmed in *State of Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 453, reh. den. 324 U.S. 890 (1945), and explained in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 (1968), as standing for the proposition that because the freight rates had been approved as reasonable by the Interstate Commerce Commission the shipper had no cause of action under the antitrust laws. However, petitioner merely characterizes the *Keogh* case as "irrelevant," without any attempt to distinguish its holding (Pet. p. 21).

III

A third claimed reason for review by this Court is that the Court of Appeals has decided an important question of federal law which has not been, but

should be settled by this Court (Pet. p. 9). Two important questions relating to 15 U.S.C.A. § 15b are claimed by petitioner to have been decided by the courts below: (1) the statute is a bar where maintenance of a joint common carrier rate constitutes the only known "overt" act continuing into the four-year limitation period, and (2) the alleged possession of monopoly power by respondents during the four-year period, coupled with petitioner's presence in the market as an affected competitor, does not constitute sufficient overtness to sustain a cause of action against a limitations defense (Pet. p. 9).

The short answer is that neither of the courts below passed upon these esoteric theories first put forward in the petition. Rather, after evaluating Mr. Ellingson's deposition and trial testimony and the documentary evidence, the district court found that ". . . any act of the defendant which may have damaged the plaintiff occurred prior to June 8, 1963," and that petitioner's claim that it had been damaged by acts of the respondents which occurred within the limitations period ". . . is not supported by any evidence" (App. p. 78a). In view of the Court of Appeals affirmance, this basic factual finding is controlling. With respect to the rule of law applicable, petitioner states it is ". . . content with the requirement that it prove overt acts *and* injury within four years preceding the filing of the complaint" (Pet. p. 26, and cases cited at Note 14). In fact, the trial court did apply this rule of law, best summarized in such cases as *Steiner* v. *20th Century-Fox Film Cor-*

poration, 232 F.2d 190 (C.A. 9, 1956); *Peto* v. *Madison Square Garden Corporation*, 384 F.2d 682 (C.A. 2, 1967), cert den. 390 U.S. 989, reh. den. 390 U.S. 1046 and *Exhibitor's Poster Exch. Inc.* v. *National Screen Serv. Corp.*, 421 F.2d 1313 (C.A. 5, 1970).

IV

Finally, petitioner seeks review by this Court because of a claimed deprival of the constitutional right to a jury trial of the factual issues involved in the trial on the segregated issues. Petitioner claims that the Court of Appeals erred in holding that petitioner waived this right.

In view of the petitioner's failure to demand a jury trial at the time of pretrial and trial, or to object to trial before the court alone, it is clear that the Court of Appeals correctly followed this Court's decision in *Duignan* v. *United States*, 274 U.S. 195 (1927), that the right to a jury trial may be waived where there is an appearance and participation in the trial before the court alone.

Furthermore, the pretrial order approved in writing by petitioner's counsel prior to the trial, made it clear that the issues were to be submitted to the court alone. Thus, there was a "written stipulation" for nonjury trial, as specified in Rule 39(a)(1) of the Federal Rules of Civil Procedure.

CONCLUSION

On the record before this Court, there is no substantial question or legal issue of public importance. The petition is only petitioner's last desperate effort to prolong a twelve-year-old controversey with respondents, commencing in June 1958 when petitioner filed its complaint with the Interstate Commerce Commission, continuing with an Oregon state court action filed in 1964, and later abandoned, and culminating in the commencement of this action in 1967.

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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